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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

ORIGINAL

No. _____

CHRISTOPHER A. BURGER,

Petitioner,

v.

RALPH KEMP, WARDEN,
GEORGIA DIAGNOSTIC AND
CLASSIFICATION CENTER,

Respondent

PETITION FOR WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

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COUNSEL FOR PETITIONER

QUESTIONS PRESENTED

I. WHETHER THE STATE TRIAL COURT'S INSTRUCTION TO THE JURY ON THE ESSENTIAL ELEMENTS OF MALICE AND INTENT, AN INSTRUCTION VIRTUALLY IDENTICAL TO THE ONE CONDEMNED BY THIS COURT IN FRANCIS v. FRANKLIN, ___ U.S. ___, 105 S.Ct. 1965 (1985), IMPROPERLY SHIFTED THE BURDEN OF PROOF OF THESE ELEMENTS FROM THE STATE. UNDER THE STANDARD ESTABLISHED BY THIS COURT IN ROSE v. CLARK, ___ U.S. ___, 106 S.Ct. 3101 (1986), THIS FRANKLIN ERROR WAS NOT HARMLESS.

II. WHETHER PETITIONER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

(A) CHRISTOPHER BURGER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL WHERE HIS TRIAL COUNSEL FAILED TO INVESTIGATE, PREPARE OR PRESENT EVIDENCE FOR THE SENTENCING PHASE OF PETITIONER'S CAPITAL TRIAL.

(B) CHRISTOPHER BURGER, AN INDIGENT, MENTALLY DEFICIENT, POSSIBLY BRAIN LAMAGED SEVENTEEN-(17) YEAR-OLD FACING THE DEATH PENALTY IN A STATE COURT CAPITAL TRIAL WAS ENTITLED TO THE APPOINTMENT OF COUNSEL WHOSE REPRESENTATION WAS NOT AFFECTED BY A SERIOUS CONFLICT OF INTEREST.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

CHRISTOPHER A. BURGER,	*	
Petitioner,	*	
v.	*	No. 86- _____
RALPH KEMP, Warden, Georgia Diagnostic and Classification Center,	*	
Respondent	*	

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner, Christopher Burger, requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit in Burger v. Kemp, 785 F.2d 890 (1986). Christopher Burger is currently under sentence of death in the State of Georgia.

CITATION TO OPINION BELOW

The opinion of the Court of Appeals rendered on March 13, 1986, is reported at 785 F.2d 890. A copy of the Eleventh Circuit slip opinion is attached as Appendix A. Rehearing en banc was denied by the Court of Appeals on July 23, 1986. (Appendix B).

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The opinion of the Court of Appeals was rendered March 13, 1986, rehearing and rehearing en banc denied July 23, 1986.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

HOW THE ISSUES WERE RAISED BELOW

Each of the constitutional issues in the Questions Presented were raised by petition for writ of habeas corpus in the district court and raised on appeal to the United States Court of Appeals for the Eleventh Circuit.

STATEMENT OF THE CASE[1]

A. Course of Proceedings

Seventeen (17) year old Christopher Burger, who had no prior criminal record, was convicted of one count of murder and sentenced to death on January 25, 1978 in the Superior Court of Wayne County, Georgia. On appeal to the Supreme Court of Georgia, the conviction was affirmed, but the death sentence was vacated and the case remanded for retrial solely on the issue of penalty. Burger v. State, 242 Ga. 28, 247 S.E. 2d 834 (1978).

On retrial, Christopher Burger was sentenced to death on July 19, 1979. The death sentence was affirmed by the Supreme Court of Georgia. Burger v. State, 245 Ga. 458, 265 S.E.2d 796, cert. denied, 448 U.S. 913 (1980).

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1. References to the transcript of Petitioner's first trial where the issue of guilt/innocence was decided will be designated "T Trial"; references to Petitioner's second trial where sentence was decided will be designated "T Sent. Trial"; references to the evidentiary hearing held in the habeas corpus proceedings in the United States District Court for the Southern District of Georgia will be designated "T H.C.".

On October 1, 1980, Petitioner filed a state Petition for Writ of Habeas Corpus in the Superior Court of Butts County, Georgia. The Petition was summarily denied without a hearing. On the same day, the Supreme Court of Georgia denied an application for certificate of probable cause to appeal.

On October 2, 1980, a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. §2254 was filed in the United States District Court for the Southern District of Georgia. An evidentiary hearing was held in the district court on March 4, 1981.

On April 29, 1981, the district court granted habeas corpus relief, only vacating Petitioner's death sentence. The district court denied relief on all other grounds alleged. Burger v. Zant, 513 F.Supp. 772 (S.D.Ga. 1981).

An appeal and cross-appeal of the district court's order were made to the United States Court of Appeals for the Eleventh Circuit.

On appeal, a panel of the Eleventh Circuit,[2] by a vote of 2-1, in an opinion by Circuit Judge Vance, reversed the district court's grant of habeas corpus relief and affirmed the district court in all other respects, effectively reinstating Petitioner's sentence of death. Circuit Judge Johnson dissented with an opinion. Burger v. Zant, 718 F.2d 979 (11th Cir. 1983). (A copy of this opinion is attached as Appendix D).

On May 29, 1984, this Court granted certiorari, vacated the decision of the Court of Appeals, and remanded the case for reconsideration in light of Strickland v. Washington, ___ U.S. ___, 104 S.Ct. 2052 (1984). Burger v. Zant, ___ U.S. ___, 104 S.Ct. 2652 (1984).

2. Honorable Clarence Allgood, United States District Judge, Northern District of Alabama sat by designation.

On February 5, 1985, the panel of the Eleventh Circuit, again by a 2-1 vote, affirmed the judgment of the district court on remand, instructing the district court to deny the Writ of Habeas Corpus. Burger v. Kemp, 753 F.2d 930 (1985). (A copy of this opinion of the Eleventh Circuit is attached as Appendix C).

This Court again granted certiorari, vacated the decision of the panel and remanded the case to the Court of Appeals for reconsideration in light of Francis v. Franklin, ___ U.S. ___, 105 S.Ct. 1965 (1985). Burger v. Kemp, ___ U.S. ___, 106 S.Ct. 41 (1985).

On remand the panel, by a 2-1 vote, again instructed the district court below to deny the Writ of Habeas Corpus. Burger v. Kemp, 785 F.2d 890 (11th Cir. 1986).

B. Statement of Facts

Christopher Burger was convicted for the murder of Roger Honeycutt on September 5, 1977.

During the evening of September 5, 1977, seventeen (17) year old Christopher Burger and his twenty (20) year old co-indictee, Thomas Stevens, both privates in the Army, stationed at Ft. Stewart, Georgia, were drinking heavily.

In his opening statement to the jury, the prosecutor stated that he would present evidence that prior to the commission of the offense, Christopher Burger consumed "approximately four or five pitchers of beer" (T-Trial at 71). The prosecutor introduced into evidence as State's Exhibit 28 Christopher Burger's confession in which Christopher Burger, a seventeen (17) year old kid, confessed: "We [Chris and co-indictee Stevens] had purchased four or five pitchers of beer and drank it at the club. After we ran out of money . . . Stevens said 'Hey I know how we can get some and I said how is that'. He then stated by robbing a taxicab driver."

Stevens then obtained a knife and knife sharpener to accomplish the robbery.

Stevens and Christopher Burger called the taxi which was driven by Roger Honeycutt. Mr. Honeycutt was threatened with the weapons obtained by Stevens and Stevens took the sixteen dollars ($16.00) in Honeycutt's possession.

At Stevens' direction, Christopher Burger drove the taxi with Stevens and Mr. Honeycutt in the back seat. Mr. Honeycutt was then sexually assaulted by Stevens. After the assault, Stevens locked Roger Honeycutt in the trunk of the taxi.

Christopher Burger and Stevens then drove to the Savannah, Georgia airport to pick up James Botsford, an acquaintance of Stevens and Petitioner. Botsford testified for the state that during the drive, Stevens told him in great detail about the robbery of Roger Honeycutt and the fact that Honeycutt was still in the trunk of the car. During this time, Christopher Burger sat quietly; it appeared to Botsford that Christopher Burger was essentially doing as Stevens directed.

When Stevens suggested that he would kill Roger Honeycutt, Christopher Burger protested that they should let Honeycutt go and ditch the taxi. Botsford testified as follows concerning this conversation:

> Q. [By the District Attorney] What did you say, if anything, about the man in the trunk?
>
> A. [By Botsford] I asked them what they intended to do with him.
>
> Q. All right. What response, if any, did you get?
>
> A. Well, Tom Stevens said that he thought they should kill him. And, I told him I thought he was crazy. And, Burger didn't like the idea of killing him either. Burger said that they ought to let him go, that they ought to drive off in the woods somewhere and let him out, and then take the car somewhere and put it like, I think somebody mentioned the ocean. They said they wanted to go to maybe Jacksonville or Savannah, and maybe run the car off a pier.
> (T Sent. Trial at 112-113).

After Botsford was dropped off at Fort Stewart, Georgia, Stevens directed Christopher Burger to drive the taxi to a pond in rural Wayne County, Georgia, a few miles from Fort Stewart. On Stevens' command, Christopher Burger drove the taxi into the pond. After doing this, Chris started to walk away and told Stevens he was leaving. Stevens told him he could not leave, "because we have to make sure -- want to make sure the car goes down, with the man in the trunk."

Stevens then disposed of the remaining physical evidence of the offense.

The further facts necessary to the issues raised in this petition will be stated in the argument of the issues.

REASONS FOR GRANTING THE WRIT

I. THE STATE TRIAL COURT'S INSTRUCTION TO THE JURY ON THE ESSENTIAL ELEMENTS OF MALICE AND INTENT, AN INSTRUCTION VIRTUALLY IDENTICAL TO THE ONE CONDEMNED BY THIS COURT IN FRANCIS v. FRANKLIN, ___ U.S. ___, 105 S.Ct. 1965 (1985), IMPROPERLY SHIFTED THE BURDEN OF PROOF OF THESE ELEMENTS FROM THE STATE. UNDER THE STANDARD ESTABLISHED BY THIS COURT IN ROSE v. CLARK, ___ U.S. ___, 106 S.Ct. 3101 (1986), THIS FRANKLIN ERROR WAS NOT HARMLESS.

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a) The Jury Instructions

Christopher Burger was tried and convicted of malice murder. Under Georgia law, malice and intent are essential elements of malice murder. Ga. Code Ann. §26-1101(a); OCGA §16-5-1(a).

At Petitioner's first trial, where the guilt/innocence issue was determined, the trial court instructed the jury on these essential elements as follows:

> I charge you now the presumptions that are rebuttable. Every person is presumed to be of sound mind and discretion. The acts of a person of sound mind and discretion are presumed to be the products of the person's will. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts. A person will not be presumed to act with criminal

> intention, but the jury may find such intention upon consideration of the words, conduct, demeanor, motive and all other circumstances connected with the act for which they (sic) accused is prosecuted.
>
> A specific intent to commit the crime charged in this indictment is an essential element that the State must prove beyond a reasonable doubt. Intent is always a question for the jury, and is ordinarily ascertained by acts and conduct. Intent may be shown in many ways, provided the jury finds that it existed from the evidence produced before you. It may be inferred from the proven circumstances, or by acts and conduct, or it may be presumed when it is the natural and necessary consequences of the act.
>
> (T-Trial at 410-411) (emphasis added).

The Georgia state trial court in Francis v. Franklin, ___ U.S. ___, 105 S.Ct. 1965 (1985), gave the following instruction to the jury on the issue of intent:

> A crime is a violation of a statute of this State in which there shall be a union or joint operation of act or omission to act, and intention or criminal negligence. A person shall not be found guilty of any crime committed by misfortune or accident where it satisfactorily appears there was no criminal scheme or undertaking or intention or criminal negligence. The acts of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be rebutted. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts, but the presumption may be rebutted. A person will not be presumed to act with criminal intention but the trier of facts, that is, the Jury, may find criminal intention upon a consideration of the words, conduct, demeanor, motive and all other circumstances connected with the act for which the accused is prosecuted.
>
> Francis v. Franklin, 105 S.Ct. at 1969-1970. (Emphasis added).

"Franklin level[ed] his [successful] constitutional attack at the following two sentences in the jury charge: 'The acts of a person of sound mind and discretion are presumed to be the product of a person's will, but the presumption may be rebutted. A person of sound mind and discretion is presumed to intend the

natural and probable consequences of his acts, but the presumption may be rebutted.'" Franklin, 105 S.Ct at 1972.

This same instruction was given, virtually verbatim, at Christopher Burger's trial (T Tria 410-411).

b) The Franklin Error Was Not Harmless

Recently, in Rose v. Clark, ___ U.S. ___, 106 S.Ct. 3101 (1986), this Court held that, "the harmless error standard of Chapman v. California, 386 U.S. 18 (1967), applies to jury instructions that violate the principles of Sandstrom v. Montana, 442 U.S. 510 (1979), and Francis v. Franklin, [105 S.Ct. 1965] (1985)." Rose v. Clark, 106 S.Ct. at 3103.

In applying this Rose v. Clark, harmless error test, "the inquiry is whether the evidence is so dispositive of intent that a reviewing court can say beyond a reasonable doubt that the jury would have found it unnecessary to rely on the [instructed] presumption [of intent]." Id. at 3109 (emphasis added).

As noted by Circuit Judge Johnson's dissent to the panel opinion in the Court of Appeals below, the evidence at trial and the argument of counsel at trial clearly contested the issue of intent at trial. This defense of lack of intent was substantial enough that the Franklin error could not be harmless beyond a reasonable doubt. As Judge Johnson stated:

> Throughout the trial, Burger's counsel sought to show that Burger's co-defendant Stevens was the moving force behind the entire crime, and that Burger was merely a follower who did what Stevens told him to do. Indeed, the district court in this case has found that an examination of the trial record shows considerable effort to portray Stevens as the chief architect of the crime. . . The essence of Burger's defense was that . . . [he] did not have the requisite intent for murder.
> Burger v. Kemp, 785 F.2d at 893-894 (dissenting opinion of Judge Johnson).

At the time the crime was committed Christopher Burger was seventeen (17), his co-indictee, Stevens, was twenty (20). A clinical psychologist testified that Chris had an I.Q. of 82 and

lacked the power of reasoning to learn from previous experiences; he was functioning at the level of a twelve (12) year old. (T Trial 247-48).

Christopher Burger was heavily intoxicated at the time of the offense.

Stevens was the leader in the relationship, Chris was the follower. Stevens planned and initiated the robbery of the victim, Stevens actually committed the robbery, Stevens sexually assaulted the victim, Stevens tied the victim and forced him into the trunk of the car. Stevens told Christopher Burger that they would have to kill the victim, Chris said he didn't want to kill him.

James Botsford, the State's key witness, testified that Christopher Burger wanted to turn the victim loose. (T Trial at 111).

> . . . Burger presented substantial evidence, and argument based on that evidence, that his participation in the crime was under the direction and control of Stevens. Stevens did virtually all the talking and gave all the orders. The crime and the killing were Stevens' ideas. Botsford testified that, when Botsford suggested that the cab driver should be set free, Burger agreed that this was what should be done.
>
> Burger's defense went squarely to the issue of whether he intended to kill the victim . . . In finding that Burger had the requisite intent, the jury might have relied on the faulty instruction . . .

Burger v. Kemp, 765 F.2d at 895, (dissenting opinion of Judge Johnson).

A defense of lack of intent was squarely raised at Chris Burger's trial and substantial supporting evidence exists in the record. Under this Court's Chapman v. California - Rose v. Clark standard, it cannot be said beyond a reasonable doubt that the jury could not have relied on the impermissible instructed persumption of intent in reaching its verdict.

II. PETITIONER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

(A) CHRISTOPHER BURGER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL WHERE HIS TRIAL COUNSEL FAILED TO INVESTIGATE, PREPARE OR PRESENT EVIDENCE FOR THE SENTENCING PHASE OF PETITIONER'S CAPITAL TRIAL.

(B) CHRISTOPHER BURGER, AN INDIGENT, MENTALLY DEFICIENT, POSSIBLY BRAIN DAMAGED SEVENTEEN-(17) YEAR-OLD FACING THE DEATH PENALTY IN A STATE COURT CAPITAL TRIAL WAS ENTITLED TO THE APPOINTMENT OF COUNSEL WHOSE REPRESENTATION WAS NOT AFFECTED BY A SERIOUS CONFLICT OF INTEREST.

This issue of ineffective assistance of counsel was raised in the petition for writ of habeas corpus in the district court below and decided adversely to Petitioner. In its previous decision in this case, the Eleventh Circuit affirmed the decision of the district court on this issue. Burger v. Kemp, 753 F.2d 930 (1985). This Court's remand order vacated the Eleventh Circuit's previous opinion in this case. Burger v. Kemp, ___ U.S. ___, 106 S.Ct. 41. The Eleventh Circuit's decision on remand, by instructing the district court to deny the writ of habeas corpus, Burger v. Kemp, 785 F.2d at 892, necessarily reinstates the previous Eleventh Circuit decision on this issue.

(A) Trial Counsel Failed to Investigate or Prepare Evidence for the Capital Sentencing Trial

Christopher Burger's trial counsel presented absolutely no evidence on Chris' behalf at either of his trials. More specifically, trial counsel presented absolutely no evidence of mitigating circumstances at the second trial where the current death sentence was imposed; the trial counsel failed to present evidence of mitigating circumstances at the second trial even

though he knew that his reliance on closing argument alone had resulted in a death sentence at the first trial.

This failure to present evidence of mitigating circumstances was based not upon a reasonable strategy decision, but rather upon a failure to conduct a reasonably adequate investigation.

The Sixth Amendment to the Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense". The Court has frequently emphasized the "fundamental" nature of this constitutional provision, Gideon v. Wainwright, 372 U.S. 335, 343-44 (1963), since, "[t]he assistance of counsel is often a requisite to the very existence of a fair trial." Argersinger v. Hamlin, 407 U.S. 24, 31 (1972). The repeated theme of the Court's decisions is that counsel serves "as a guide through complex legal technicalities" for the lay person, United States v. Ash, 413 U.S. 300, 307 (1973), and as a counterweight in the adversary system to the creation of a professional prosecuting official. Id. at 309.

"[C]ounsel has a duty to make reasonable investigation or to make a reasonable decision that makes particular investigations unnecessary." Strickland v. Washington, ___ U.S. ___, 104 S.Ct. 2052, 2066 (1984).

Christopher Burger's trial counsel made his decision to cease investigation into Christopher Burger's background and to present no evidence of this background at sentencing after conversations with Chris and his mother.

Trial counsel knew that Christopher Burger was a seventeen (17) year old adolescent with an I.Q. of only 82 and possible brain damage (T Trial 1 244, 247-48). Christopher Burger could hardly be expected to be conversant with the intricacies of the broad range of admissible evidence at the penalty phase of trial. Counsel could not make a "reasonable" determination to cease

investigation solely on the basis of his inadequate conversations with his client.

Trial counsel's conversation with Chris' mother was equally insufficient to support any reasonable decisions concerning further investigation and the decision to forego the presentation of evidence. Trial counsel testified as follows concerning his conversation with Chris' mother:

> "Q. When is the first time you talked to any of his [Christopher Burger's] family?
>
> A. [By Mr. Leaphart] Whenever they came to town.
>
> Q. Did you call and tell them about the trial?
>
> A. No, I don't think I did.
>
> Q. Well, the time that the trial was going to happen the first time, you had talked to the family before the--before the supposed--
>
> A. I can't remember. I think I talked with his mother, at some point in time.
>
> Q. Before that.
>
> A. Before the trial?
>
> Q. Before she came to town. You had talked to her.
>
> A. I may have talked to her on the phone. I can't remember.
>
> Q. Did you ask her anything about his background?
>
> A. Yes, I think we discussed it.
>
> Q. Did you explain to her what the penalty phase of the trial was about, and what evidence could be presented then?
>
> A. I don't think I went into that with her."
>
> (T-H.C. at 36) (emphasis added).

Trial counsel testified that he conducted no further investigation into mitigating circumstances between the first and second trials (T-H.C. at 43-44).

This testimony is consistent wit Chris' mother's (Mrs. Betty Foster) recollection of her conversations with trial counsel:

> Q. Then did you come down for the first trial?
>
> A. [By Mrs. Foster] Yes, sir.
>
> Q. And, what opportunity and how long did you talk to him [trial counsel] before the first trial?
>
> A. I saw him for possibly a half hour prior to going to court.
>
> Q. All right, and did he at that time tell you anything about the type of evidence that could be presented, or ask you anything about Chris' background?
>
> A. He asked me if Chris had ever had any psychological checking, or anything, and I advised him that he had as a child. And, he asked me to try and through Chris' power of attorney get that information for him from the State of Indiana from Florida where I had taken it.
>
> Q. Did you get that information?
>
> A. Yes, sir. I did.
>
> Q. And, did the psychologist ever talk to you? Did Dr. O'Hare ever talk to you, the psychologist that Mr. Burger's attorney, Mr. Leaphart had hired, did he ever talk to you?
>
> A. No, sir, I never saw him until during the first trial when he testified.
>
> * * * * * *
>
> Q. And, after he was found guilty at the first trial, did Mr. Leaphart tell you anything about what type proceeding could take place to determine what punishment he got?
>
> A. No, sir, not really. (T. Hab. Cor. 76-77).
>
> * * * * * *
>
> Q. Did he [trial counsel] tell you anything about what could happen in the penalty phase of the trial?
>
> A. No sir.

Q. Did you know anything about what could happen after he had been found guilty, what evidence the jury could hear?

A. No, I didn't.

Q. Did anybody ask you about the possible witnesses -- getting any witnesses to testify?

A. No, sir.

Q. After the first trial, did anybody ask you about witnesses for the second trial?

A. No, sir.

Q. Did anybody explain to you what could be put into evidence on his retrial on the punishment phase?

A. No, sir.

Q. Did you know?

A. No.

Q. Did you have any idea until we contacted you and told you about these proceedings?

A. No, I did not. (T-H.C. 80).

Judge Johnson, in his dissent to the Eleventh Circuit's previous opinion, analyzed trial counsel's failure to conduct an adequate investigation:

> . . . [It cannot] be said that Leaphart's [trial counsel's] choice to curtail investigation and to present no evidence at the sentencing proceedings was a reasonable strategic decision based on reasonable assumptions. Leaphart has attempted to justify his approach by reference to three strategies or assumptions: 1) that Leaphart's theory of defense, or strategy, was to make the state prove its case; 2) that, if mitigating evidence had been offered at Burger's sentencing proceedings, Leaphart would have lost the right to opening and closing argument; and 3) that Leaphart chose to rely in closing on the argument that Burger had never been in trouble before, which would have been undercut by an investigation into and testimony concerning Burger's background. Even conceding that broad range must be given to the operation of professional judgment, Strickland v. Washington, 104 S.Ct. at 2065-66, none of these strategies or assumptions withstand scrutiny for reasonableness.

* * * * *

> . . . Leaphart testified that he made a decision not to offer any evidence in mitigation in order to preserve his right to opening and closing arguments. Again, the basic assumption on which this strategy was based is patently unreasonable. O.C.G.A. §17-10-2(a) & (c) (1982), formerly Ga. Code Ann. §27-2503(a) & (c) (1933), provide for the conduct of sentencing proceedings in capital cases: 'The district attorney shall open and the defendant or his counsel shall conclude the argument.' The presentation of evidence by the defendant at a capital sentencing proceeding in no way affects this division of argument between the state and the defense. In fact, this procedure was followed at Burger's sentencing proceedings: the district attorney opened and the defense closed final arguments to the jury. Leaphart simply failed to inform himself of basic Georgia Criminal procedure in sentencing procedings. Cf. Young v. Zant, 677 F.2d 792 (11th Cir. 1982). No strategy based on such a false assumption is reasonable. The district court clearly erred in concluding otherwise.
>
> The district court also found that Leaphart's failure to substantially investigate mitigating evidence was based on a strategic choice to rely in closing argument on the 'major argument' in Burger's behalf that he had no prior record of violent crime and had never been in trouble before. As it relates to Burger's second sentencing proceeding, this finding is contradicted by the record: at no point in his closing argument did Leaphart mention the lack of evidence that Burger had a record or had been in trouble before. Instead, Leaphart's closing argument at the second sentencing proceeding stressed Burger's comparative lack of culpability and asked for the jury's mercy. This argument would not have been undercut by the presentation of humanizing evidence concerning Burger's background.
>
> Burger v. Kemp, 753 F.2d at 945-947. (dissenting opinion of Judge Johnson) (footnotes omitted) (emphasis added).

In judging whether Petitioner was prejudiced by the ineffective assistance of trial counsel the bottom line is, did the representation result in a "trial [which] cannot be relied on as having produced a just result" i.e., did he receive "a trial whose result is reliable". Strickland v. Washington, 104 S.Ct. at 2064. Petitioner "need not show that counsel's deficient

conduct more likely than not altered the outcome in the case." Strickland v. Washington, 104 S.Ct. at 2068.

This Court in Eddings v. Oklahoma, 455 U.S. 104 (1982), indicated the type of information critical to a reliable determination of sentence in a capital proceeding involving a teenager. The Court stated in Eddings:

> "Evidence of a difficult family history and of emotional disturbance is typically introduced by defendants in mitigation [cite omitted[.] In some cases such evidence properly may be given little weight. But when the defendant was 16 years old at the time of the offense, there can be no doubt that evidence of a turbulent family history of beatings by a harsh father, and of severe emotional disturbance is particularly relevant.
>
> * * * *
>
> . . . just as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered in sentencing."
> Eddings, 455 U.S. at 115-116.

Seventeen (17) year old Christopher Burger's background was uncannily similar to that of Eddings; if anything, the mitigation is more persuasive in Chris' case. This mitigation was aptly summarized by Judge Johnson:

> At the federal habeas hearing, Burger offered the testimony of his mother and numerous affidavits concerning his troubled childhood and background. This evidence demonstrated that Burger's parents had been married when his mother was fourteen and his father was sixteen. [T-H.C. 81]. His parents divorced when he was a child. Neither parent wanted Burger and his childhood was spent being shuffled between the two. His father threw him out of the house; his mother sent him back to live with his father. [T-H.C. 84]. Burger's mother remarried. Burger's stepfather beat Burger, and beat Burger's mother in his presence; Burger's stepfather involved him in drugs and alcohol when he was eleven years old. [T-H.C. 84-85]. Burger's mother and stepfather moved from Indiana to Florida. Burger was sent to live with his father. Burger's father beat him and refused to have anything to do with him. Burger ran away and hitchhiked to Florida to live with his mother, selling his shoes to buy food

along the way. When Burger arrived barefoot in Florida, his stepfather told him he could not stay with them. Burger's mother told juvenile authorities that she didn't want him and to send him back to his father in Indiana. When Burger arrived in Indiana, his father locked him out of the house. [T-H.C. 85-86]. Burger was taken in by a neighbor, as he had nowhere else to go. [cf. Affidavits at R-142-153]. The clinical psychologist who examined Burger testified at a motion hearing that Burger had an I.Q. of 82 and possible brain damage.[3] [T Trial 244, 247-248].

I cannot accept the holding that the failure to present this evidence was not prejudicial to Burger. The district court found that, although the affidavits of the character witnesses supplied by Burger at the hearing do 'contain references to a difficult childhood which might have created some sympathy for Mr. Burger,' they also contained references to drug abuse, juvenile probation and violence. However, the thrust of the character testimony offered by Burger was not that Burger was a model citizen, but that Burger's personality and motivation could be explained by his unusually stormy childhood. Although this is precisely the kind of humanizing evidence that 'may make a critical difference, especially in a capital case,' Stanley v. Zant, supra, 697 F.2d 969, Leaphart elected neither to conduct further investigation nor to use the evidence at the sentencing proceeding. Having heard the state's case, unmitigated by any evidence presented on behalf of petitioner, two sentencing juries recommended the death penalty.

Failure to present this substantial, available mitigating evidence meets the prejudice prong of Strickland v. Washington, supra. In fact Leaphart's failure to investigate or to present evidence on his client's behalf is an apt example of the kind of 'breakdown in the adversarial process,' id. at 2069, that requires a reviewing court to find the results of a proceeding unreliable.

Burger v. Kemp, 753 F.2d at 947-948. (dissenting opinion of Judge Johnson) (emphasis added).

In Eddings, supra, the death sentence was reversed by this Court because his sentencer [a judge] refused to consider

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3. This evidence of Christopher Burger's low I.Q. and possible brain damage was presented only at a motion hearing but was never presented to the jury at either trial.

Eddings' background as a mitigating factor. Christopher Burger's sentencer [a jury] failed to consider Chris' background as a mitigating factor; this was due to trial counsel's failure to investigate or present the evidence. In both Eddings and Chris Burger's case, the sentence of death was imposed without consideration of a "particularly relevant" . . . "mitigating factor of great weight." Eddings, 455 U.S. at 115-116.

As recognized by this Court in Eddings, these mitigating circumstances are precisely the type of evidence, in the case of a teenage defendant, which would create "a reasonable probability that absent [counsel's] errors the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Strickland v. Washington, 104 S.Ct. at 2069.

B) Trial Counsel's Representation of Petitioner Was Affected by a Serious Conflict of Interest

Alvin Leaphart was appointed by the trial court as counsel for Christopher Burger at the state court trial, at the second sentencing trial and on direct appeal to the Supreme Court of Georgia. Mr. Leaphart's law partner in a two-partner law firm, Robert Smith, was appointed by the trial court to represent Christopher Burger's co-indictee, Thomas Stevens. (T-HC 13).

Mr. Leaphart never informed Christopher Burger of the possibility of a conflict of interest nor did the trial court which made the appointment of counsel, ever inquire into the possibility of a conflict of interest (T-HC 15-16).

Leaphart conducted attorney-client conferences with both Stevens and Christopher Burger; he assisted Smith in the preparation of Stevens' case and Smith assisted him in the preparation of Christopher Burger's case. (T-HC 15, 18). The

two partners discussed the issues involved in each case and researched the law together. (T-HC 18).

Leaphart primarily prepared the briefs for both Stevens and Christopher Burger on the second appeal to the Supreme Court of Georgia. (T-HC 40-41).

The fee received by each attorney for representing each client was deposited in the law firm's corporate account. (T-HC 14-15).

This Court in Strickland v. Washington, supra, citing Cuyler v. Sullivan, 446 U.S. 335 (1980), noted that where a conflict of interest is shown, prejudice is presumed where counsel "actively represents conflicting interests" and "that an actual conflict of interest adversely affected [the] lawyer's performance" Strickland, 104 S.Ct. at 2067.

The primary issue at trial, as perceived by counsel, was intent and Chris Burger's lesser culpability vis-a-vis his adult co-indictee, Stevens. This evidence of lesser culpability and the impact of the resulting conflict of interest was summarized by Judge Johnson in dissent to the previous Eleventh Circuit opinion:[4]

> . . . At the time the crime was committed, Burger was seventeen; Stevens was twenty. Burger has an I.Q. of 82 and possible brain damage. Stevens appeared to be the leader in their relationship; Burger was the follower. Stevens planned and initiated the robbery of the victim; Burger followed his instructions. Stevens actually committed the robbery; Stevens made the victim undress; Stevens forced the victim to perform oral sodomy on Stevens; Stevens anally sodomized the victim; Stevens tied the victim up and forced him to get in the trunk of the cab. Stevens told Burger they would have to kill him; Burger said he didn't want to kill him. Stevens told Burger they would have to get rid of the cab by driving it into the pond; Stevens

4. No facts of the conflict of interest were stated in the majority opinion. The majority opinion adopted, without further comment on this issue, the decision of the District Court below. Burger v. Kemp, 753 F.2d at 932.

ordered Burger to drive the cab with the victim locked in the trunk into the pond. Burger drove the cab and the victim into the pond. In short, the essence of Burger's defense was that he was less culpable than Stevens.

In this situation, any evidence or arguments made by counsel in Burger's behalf would, by the very nature of Burger's defense, damage Stevens. Such adversity in the interests of Leaphart's clients demonstrates that an actual conflict of interest existed. See Zuck v. Alabama, supra, 588 F.2d at 439 (adversity sufficient to demonstrate actual conflict of interest exists if "the attorney owes a duty to the defendant to take some action that could be detrimental to his other client").

The evidence provided by petitioner also demonstrates that this conflict "adversely affected his lawyer's performance." Strickland v. Washington, supra, 104 S.Ct at 2052. On several occasions, Leaphart refrained from taking actions in support of Burger that would have been detrimental to Stevens. For example, at no time in his representation of Burger did Leaphart offer Burger's testimony against Stevens in exchange for a sentence less than the death penalty for Burger [T-H.C. 38-39, 65]. See Baty v. Balkcom, supra, 661 F.2d at 397 N. 12 ("[p]lea bargains are perhaps the most obvious example of the manifest effects of a conflict of interest at pretrial proceedings."); see also, Fleming v. State, 246 Ga. 90, 270 S.E.2d 185, 189 (Bowles, J., concurring) ("[n]o two defendants share equal responsibility for a crime. Usually one is more culpable than the other or for any number of reasons has a greater degree of responsibility for what occurred. One may also be more entitled to leniency based on such factors as age, intelligence, motive, background, previous conduct or record, etc. Common counsel eliminates any practical possibility of plea bargaining.")

* * * * * *

At the federal habeas hearing, Leaphart testified that he had not, at any time during his representation of Burger, discussed with the district attorney the possibility of Burger's testifying against Stevens in return for a lighter sentence. [T-H.C. at 38-39]. When further questioned about plea negotiations in Burger's case, Leaphart testified that he had engaged in plea negotiations, but that "during the first trial [the district attorney] refused to discuss it in any terms." [T-H.C. at 65] [emphasis supplied]. From this account it appears that plea negotiations were engaged

> into in this case; that Leaphart never offered Burger's testimony against Stevens; and that, after Burger's first trial had begun, the district attorney refused to discuss a plea on whatever terms Leaphart had offered, presumably not the terms of Burger's testifying against Stevens since Leaphart testified he did not at any time make such an offer. Thus, appellant's argument that no pretrial conflict of interest could have arisen due to the district attorney's refusal to plea bargain is contradicted by the record.
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> * * * * * *
>
> Stevens was not called as a witness by the defense. Finally, Leaphart prepared the briefs for both Burger and Stevens on each defendant's second appeal to the Supreme Court of Georgia. In Burger's brief, Leaphart does not argue that he was the less culpable party, although the scope of the Supreme Court of Georgia's appellate review in capital cases includes a consideration of whether the "sentence of death is excessive or disproportionate to the penalty in similar cases, considering both the crime and the defendant." O.C.G.A. §17-10-35(c)(3)(1982), formerly Ga. Code Ann. §27-2537(c)(3)(1933).
>
> Burger v. Kemp, 753 F.2d at 944-945. (dissenting opinion of Judge Johnson) (emphasis added, footnote 7 omitted).

A situation more conducive to divided loyalties than the situation in this case can hardly be imagined. Faced with the serious conflicts between Christopher Burger and Stevens, there is no way that the two law partners could vigorously and fully

represent Christopher Burger while also representing Stevens.[5] Attorney Leaphart perceived a defense based on the seventeen-(17) year-old Christopher Burger's lesser culpability vis-a-vis the adult Stevens. However any action taken by Leaphart on behalf of Christopher Burger would work to the extreme disadvantage of Stevens.

Faced with the previously detailed disparity in the culpabilities of the parties, Attorney Leaphart should have offered Christopher Burger's testimony against Stevens to the prosecution in exchange for a lesser sentence than death. Unfortunately, Mr. Leaphart never even raised this possibility in plea discussions with the State (T-HC 38-39, 65). And, of course, how could he have arranged this plea negotiation when his divided loyalties also required the protection of Stevens.

This Court in Wood v. Georgia, 450 U.S. 261, 268-69 (1981), clearly recognized as one of the "inherent dangers" of a conflict of interest that the attorney with divided loyalties "will prevent his client from obtaining leniency by preventing his

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5. This Court has consistently emphasized the importance of consideration of the individual in the sentencing phase of a capital case. E.g., Eddings v. Oklahoma, 455 U.S. at 112 (1982):

> ". . . the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender . . . as a constitutionally indispensable part of the process of inflicting the penalty of death [quoting Gregg v. Georgia]"
>
> * * * * * *
>
> "By holding that the sentencer in capital cases must be permitted to consider any relevant mitigating factor, the rule in Lockett [v Ohio] recognizes a consistency produced by ignoring individual differences is a false consistency" (emphasis added).

client from offering testimony against" the more culpable party.[6]

In Holloway v. Arkansas, 435 U.S. 475, 489-90 (1978), this Court, in addressing the problem of conflicts of interest in the representation of multiple defendants by single counsel, stated:

> Joint representation of conflicting interests is suspect because of what it tends to prevent the attorney from doing. For example, in this case it may well have precluded defense counsel . . . from exploring possible plea negotiations and the possibility of an agreement to testify for the prosecution, provided a lesser charge or a favorable sentencing recommendation would be acceptable.

Leaphart was actively involved in the representation of Christopher Burger's co-defendant, Stevens; he consulted confidentially with Stevens, aided in preparing his case for trial and prepared his briefs on appeal (T-HC 13-18). However, even had Leaphart not been directly involved in the representation of Stevens, a Sixth Amendment conflict of interest would still exist where the joint representation was by two

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6. The Supreme Court of Georgia, subsequent to Christopher Burger's trials, adopted a mandatory rule in death penalty cases that co-defendants must be provided with separate and independent counsel. This rule applies with equal force to representation by a single attorney or by members of the same law firm. Fleming v. State, 264 Ga 90, 270 S.E.2d 185, 188 and n.7 (1980). "Such a rule is especially necessary where the death penalty is sought, because in these cases even a slight conflict, irrelevant to guilt or innocence, may be important in the sentencing phase." Id. at 188.

The logic of this rule, explained by Justice Bowles of the Georgia court in his concurring opinion is particularly relevant in Christopher Burger's case:

> No two defendants share equal responsibility for a crime . . . One may [be] entitled to leniency based on such factors as age, intelligence, motive, background, previous conduct or record, etc. Common counsel eliminates any practical possibility of plea bargaining.
>
> Id. at 189 (Bowles, J, concurring) (emphasis added).

different members of the same firm.[7]

The fault in this case lies not only with Mr. Leaphart who failed to call to the court's or Christopher Burger's attention the conflict of interest.[8] The blame must fall, possibly more heavily, on the trial court which appointed one law firm to represent both co-defendants and failed to ever inform Christopher Burger of the conflict.

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7. Eg. United States v. Flannagan, 679 F.2d 1075 (3d Cir. 1982); Ross v. Heyne, 638 F.2d 979, 983 (7th Cir. 1980); Zuck v. Alabama, 588 F.2d 436, 438 (5th Cir. 1979); United States v. Donahue, 560 F.2d 1039, 1042 (1st Cir. 1977).

   Cf. ABA CODE OF PROFESSIONAL RESPONSIBILITY DR5-105 (D); ABA Standards Relating to the Administration of Criminal Justice, The Defense Function §3.5(b):

   > Except for preliminary matters such as initial hearings or applications for bail, a lawyer or lawyers who are associated in practice should not undertake to defend more than one defendant in the same criminal case if the duty to one of the defendants may conflict with the duty to another. The potential for conflict of interest in representing multiple defendants is so grave that ordinarily a lawyer should decline to act for more than one of several co-defendants except in unusual situations when, after careful investigation, it is clear that no conflict is likely to develop and when the several defendants give an informed consent to such multiple representation. (emphasis added).

8. Cf. Holloway v. Arkansas, 435 U.S. at 485: ". . . defense attorneys have the obligation, upon discovering a conflict of interest, to advise the court at once of the problem."

   Contrast the circumstances of Christopher Burger's case with those in United States v. Mandell, 525 F.2d 671 (7th Cir. 1975) where trial counsel informed his client of the possible dangers of multiple representation of co-defendants:

   > "We think the Sixth Amendment rights of defendants are adequately safeguarded by imposing the duty of informing defendants of the potential dangers of multiple-client representation initially on the attorneys, as officers of the court. . ." Id. at 677 (emphasis added).

As stated by the Fifth Circuit in Foxworth v. Wainwright, 516 F.2d 1072, 1076 (5th Cir. 1975)[9]:

> The trial judge has an obligation, however, to anticipate conflicts reasonably foreseeable at the outset of the case when counsel is appointed.
>
> * * * * *
>
> . . . courts must avoid compromising counsel's ability to represent a client zealously within the bounds of the law by appointing one lawyer to defend two or more parties with inconsistent interests.

Although great prejudice to Christopher Burger is shown from the facts of the conflict of interest in this case, a showing of prejudice is not necessary. "Thus, a defendant who shows that a conflict of interest actually affected the advocacy of his representation need not demonstrate prejudice in order to obtain relief." Cuyler v. Sullivan, 446 U.S. at 349-50.

As this Court noted in Holloway v. Arkansas, 435 U.S. at 490:

> ". . . in a case of joint representation of conflicting interests the evil -- it bears repeating -- is in what the advocate finds himself compelled to refrain from doing, not only at trial but also as to possible pretrial negotiations and in the sentencing process . . . Thus, an inquiry into a claim of harmless error here would require, unlike most cases, unguided speculation.

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9. The quoted language from Foxworth v. Wainwright was noted with approval in Cuyler v. Sullivan, 446 U.S. 335, 347, n.13 (1980) as an exception to the general rule that the trial court is not required to automatically inquire into the circumstances of multiple representation.

CONCLUSION

Based on the foregoing, Petitioner's Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served counsel for the opposing party with a copy of the foregoing pleading by placing same in the United States Mail with adequate first-class postage attached thereon addressed to Mr. Michael J. Bowers, Attorney General, State of Georgia, 132 State Judicial Bldg., 40 Capitol Square, S.W., Atlanta, Georgia 30334.

This 28th day of August, 1986.

Joseph M. Nursey
COUNSEL FOR CHRISTOPHER BURGER

P.O. Box 1978
Atlanta, Georgia 30301
(404) 688-8116

Christopher A. BURGER,
Petitioner-Appellee,
Cross-Appellant,

v.

Ralph KEMP, Warden, Georgia Diagnostic and Classification Center,
Respondent-Appellant, Cross-Appellee.

No. 81-7419.

United States Court of Appeals,
Eleventh Circuit.

March 13, 1986.

After his conviction and sentence of death were affirmed by the Georgia Supreme Court, 242 Ga. 28, 247 S.E.2d 834, and 245 Ga. 458, 265 S.E.2d 796, state prisoner sought habeas corpus. The United States District Court for the Southern District of Georgia, B. Avant Edenfield, J., 513 F.Supp. 772, granted relief and state appealed. The Court of Appeals, 718 F.2d 979, reversed and remanded. The United States Supreme Court, 104 S.Ct. 2652, vacated and remanded. The Court of Appeals, 741 F.2d 1274, remanded. The District Court then denied relief and prisoner again appealed. The Court of Appeals, 753 F.2d 930, affirmed. The United States Supreme Court, 106 S.Ct. 41, remanded. The Court of Appeals held that error in giving instruction which could have been understood as creating a mandatory presumption of intent was harmless.

Remanded.

Johnson, Circuit Judge, filed a dissenting opinion.

1. Criminal Law ⇐1172.2

If intent is not at issue in the case or if intent is overwhelming proved, error in giving an instruction which could be understood as creating mandatory presumption of intent may be found harmless.

2. Criminal Law ⇐778(6)

Jury may never be instructed that intent is or must be presumed.

3. Criminal Law ⇐1172.2

Where defendant did not specifically deny the element of intent but, rather, merely put the prosecution to its proof, error in giving instruction which could have been understood as creating a mandatory presumption of intent was harmless despite evidence that defendant had consumed four or five pitchers of beer before the incident.

Appeals from the United States District Court for the Southern District of Georgia.

Before VANCE and JOHNSON, Circuit Judges, and ALLGOOD*, Senior District Judge.

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

PER CURIAM:

This habeas corpus action, before us for the third time, was remanded by the Supreme Court for our reconsideration in light of *Francis v. Franklin*, — U.S.

* Honorable Clarence W. Allgood, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

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APPENDIX A

——, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985), *aff'g* 720 F.2d 1206 (11th Cir.1983). The facts of the underlying murder case, for which petitioner Burger was sentenced to death, are reported at *Blake v. Zant*, 513 F.Supp. 772, 788–89 (S.D.Ga.1981). The sole issue now before us is whether the trial court's jury instruction on intent impermissibly shifted the burden of proof on that issue to the defendant. We hold that the challenged instruction constituted harmless error. In our previous opinions, 718 F.2d 979 (11th Cir.1983), 753 F.2d 930 (11th Cir.1985), we found the other issues presented in Burger's habeas petition to be without merit. Consequently, we remand to the district court with instructions that the writ be denied.

In *Franklin*, the petitioner argued that the state trial court erred in giving the following jury instruction:

> A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts, but the presumption may be rebutted. A person will not be presumed to act with criminal intention but the trier of facts, that is, the Jury, may find criminal intention upon a consideration of the words, conduct, demeanor, motive and all other circumstances connected with the act for which the accused is prosecuted.

Franklin, — U.S. ——, 105 S.Ct. at 1969–70; 720 F.2d at 1209 n. 2. The Supreme Court agreed with our conclusion that this instruction was constitutionally infirm under *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979), because a reasonable juror could understand it as creating a mandatory—though rebuttable—presumption of intent shifting the burden of proof on that issue to the defense. — U.S. at ——, 105 S.Ct. at 1977; 720 F.2d at 1212. The Court also agreed with our finding that under the circumstances of the case, the *Sandstrom* error could not be considered harmless. *Id.*

The jury instruction challenged in this case is virtually identical to the one held unconstitutional in *Franklin*. After giving the *Franklin* instruction, however, the court in this case added the following:

> A specific intent to commit the crime charged in this indictment is an essential element that the State must prove beyond a reasonable doubt. Intent is always a question for the jury, and is ordinarily ascertained by acts and conduct. Intent may be shown in many ways, provided the jury finds that it existed from the evidence produced before you. It may be inferred from the proven circumstances, or by acts and conduct, or it may be presumed when it is the natural and necessary consequences of the act.

Blake, 513 F.Supp. at 792.

This additional language, taken by itself, appears to be constitutionally unobjectionable, rather than creating a mandatory presumption, it merely instructs the jury that it *may* presume intent from the natural consequences of an act. The Supreme Court made clear in *Franklin*, however, that "[l]anguage that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity." — U.S. at ——, 105 S.Ct. at 1975. Thus, whether this additional language sufficed to render the instruction constitutional may depend upon whether the language is viewed as clarifying or merely contradicting the erroneous charge which preceded it.

[1] We need not reach this issue, however, because we conclude that any error in the instruction was harmless. In *Franklin* the defendant had based his entire defense on the issue of intent, and "[t]he facts did not overwhelmingly preclude that defense." 720 F.2d at 1212. We thus concluded that "[b]ecause intent was plainly at issue in [the] case, and was not overwhelmingly proved by the evidence ... we cannot find this error to be harmless." *Id.* The Supreme Court agreed. — U.S. at ——, 105 S.Ct. at 1977. On the other hand, if intent is *not* at issue in a case, or if intent *is* overwhelmingly proved, a *Sandstrom* error on the element of intent may be found harmless. *Davis v. Kemp*, 752 F.2d 1515, 1521 (11th Cir.) (en banc), *cert. denied*, — U.S. ——, 105 S.Ct. 2689, 86 L.Ed.2d 707 (1985).[1]

In this case, Burger's sole defense was to put the prosecution to its proof. As the essence of such a defense is to require the state to fulfill its burden as to each element of the offense, it cannot be said that intent was not at issue. *Cf. id.* (defense of non-participation removes intent from issue even without explicit concession). Nevertheless, it is significant that Burger chose not to raise the issue of intent expressly, for this left uncountered the strong implication of intent which was bound to arise from the evidence presented by the state.

The record tends to show that after sexually assaulting their victim, Burger and his co-defendant placed the victim in the trunk of his taxicab. After telling a friend what they had done, they drove to a water-filled pit. Opening the trunk, Burger found that the victim was still alive. With the victim still inside Burger then closed the trunk once more, removed incriminating fingerprints from the vehicle, and drove the car into the pond, jumping out as the car entered the water. The victim died of drowning. Eventually, Burger confessed to the crime, described the incident in great detail, and led authorities to the pit, pointing out where they could find the victim's body.

Burger's only argument as to why the *Sandstrom* error should not be considered harmless in light of the overwhelming evidence from which the jury could infer intent is that he had consumed "four or five pitchers of beer" before the incident. This, he argues, brings his case under our decision in *Thomas v. Kemp*, 766 F.2d 475 (11th Cir.1985), in which a *Sandstrom* error on intent was found not harmless where the defendant was intoxicated. In *Thomas*, however, the defendant affirmatively raised the issue of intent:

> Thomas took the stand in his own defense and testified that he had no memory of the incident ... He attributed his lack of memory to pills he ... ingested .... Thomas' counsel elicited testimony from the State's examining psychiatrist that it would be possible for a drug to "overmaster [a] person's will or impel him to commit a crime," ... [and] requested and obtained a jury charge on drug intoxication....

766 F.2d at 455–56. By contrast, Burger raised no intoxication defense. Burger's counsel mentioned the beers in his opening statement and Burger's confession referred to them, but the defense made no attempt to argue that the alcohol in any way diminished Burger's capacity or rendered him incapable of forming an intent to commit the murder.

1. We note that the Supreme Court has recently granted certiorari in a case in which it may consider whether a *Sandstrom* error was harmless. *Rose v. Clark*, 762 F.2d 1096 (4th Cir.), *cert. granted*, — U.S. ——, 106 S.Ct. 59, 88 L.Ed.2d 38 (1985).

[2, 3] Under *Sandstrom*, a jury may never be instructed that intent is or must be presumed. Nevertheless, a case may present circumstances which imply intent so overwhelmingly that a reviewing court may conclude that any reasonable jury would infer intent even without being instructed that it had to do so. This is such a case. We are convinced beyond a reasonable doubt that a reasonable jury would have convicted Burger without having to interpret the jury instructions as creating a mandatory presumption of intent. We therefore hold that any error in the instructions was harmless.

The case is REMANDED to the district court with instructions that the writ be denied.

JOHNSON, Circuit Judge, dissenting:

In *Franklin v. Francis*, — U.S. —, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985), the United States Supreme Court held that a jury instruction virtually identical to one given in this case was unconstitutional because a reasonable juror could have understood it to shift to the defendant the burden of proof on the issue of intent. The majority does not reach the issue of whether additional language rendered this instruction constitutionally permissible in the instant case, because the majority holds that, even if the instruction was unconstitutional, any error in the instruction was harmless. In coming to this conclusion, the majority misreads the record of petitioner's trial in state court. I dissent.

I. Constitutionality of the Challenged Instruction

It is clear that the challenged instruction in the instant case violated *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979), and its progeny, and therefore was unconstitutional. As in *Franklin*, the jury was instructed: "A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts, but the presumption may be rebutted." A reasonable juror could have understood this instruction to create "a mandatory presumption that shifted to the defendant the burden of persuasion on the element of intent once the State had proved the predicate acts." *Franklin, supra*, 105 S.Ct. at 1972.

The instruction in the instant case was followed by a further instruction, which stated:

> A specific intent to commit the crime charged in this indictment is an essential element that the State must prove beyond a reasonable doubt. Intent is always a question for the jury, and is ordinarily ascertained by acts and conduct. Intent may be shown in many ways, provided the jury finds that it existed from the evidence produced before you. It may be inferred from the proven circumstances, or by acts and conduct, or it may be presumed when it is the natural and necessary consequences of the act.

Blake v. Zant, 513 F.Supp. 772, 792 (S.D. Ga.1981). As the majority notes, the Supreme Court stated in *Franklin* that "[l]anguage that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity." *Franklin, supra*, at 1973. The Court continued, "A reviewing court has no way of knowing which of the two irreconcilable instructions the jurors applied in reaching their verdict." *Id.*

The instruction following the *Franklin* instruction in the case does not explain the *Franklin* instruction. In stating that the jury *may* presume intent from the natural consequences of an act, the second instruction merely contradicts the first. In this situation, we are required to hold that the *Franklin* instruction was unconstitutional.

II. Harmless Error Analysis

Where a burden-shifting instruction on intent constitutes *Sandstrom* error, the error can be held harmless if the court can say beyond a reasonable doubt that the faulty instruction did not contribute to the verdict obtained. *Davis v. Kemp*, 752 F.2d 1515, 1521 n. 7 (11th Cir.1985) (en banc) (*quoting Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)). This Court has identified two situations where a *Sandstrom* violation on the issue of intent can be held harmless: (1) where intent is not at issue in the case, or (2) where the evidence of intent is overwhelming. *R Tucker v. Kemp*, 762 F.2d 1496, 1502 (11th Cir.1985) (en banc).

The majority holds that in the instant case the petitioner's sole defense was to put the prosecution to its proof. The majority concludes that, although this defense put intent at issue, the defense "left uncountered the strong implication of intent which was bound to arise from the evidence presented by the state." The majority therefore holds that the evidence of intent in this case was overwhelming, and that the *Sandstrom* error was harmless.

A reading of the state trial transcript reveals that Burger's defense entailed far more than simply putting the prosecution to its proof. Throughout the trial, Burger's counsel sought to show that Burger's co-defendant Stevens was the moving force behind the entire crime, and that Burger was merely a follower who did what Stevens told him to do. Indeed, the district court in this case has found that an examination of the trial record shows considerable effort to portray Stevens as the chief architect of the crime. *Blake, supra*, at 795. The essence of Burger's defense was that, although Burger took part in the crimes, he did so under duress and did not have the requisite intent for murder.

The state's main evidence in the guilt phase of this case came from a confession given by Burger and from testimony by James R. Botsford, who was in the same military unit as Burger and Stevens and was their squad leader. The confession was read to the jury by witness Clarence Haire, trial transcript ("tr.") at 278–286, who had taken the confession. In his confession, Burger stated that he and Stevens were out drinking on the night of the crime and ran out of money. Stevens suggested to Burger that they could get some money by robbing a cab driver. Stevens and Burger arranged to take a taxicab to the airport, where they were to pick up Botsford.

On the way to the airport, Stevens pulled a butcher knife on the cab driver, the victim of the crime. After the victim said that he had only sixteen dollars, Stevens forced the victim to get out of the cab and remove his clothes. Stevens discarded the clothes and got in the rear of the vehicle with the cab driver. While Burger was driving, Stevens forced the victim to perform oral sodomy upon him, and Stevens then performed anal sodomy on the victim. At some point, Burger stopped the car and the victim was put in the trunk of the car.

Burger and Stevens picked up Botsford at the airport and proceeded to drive Botsford back to Fort Stewart, their military base. Botsford asked Burger why he was

driving the taxicab, and Stevens answered that they had "taken" the taxicab. Stevens told Botsford that the cab driver was in the trunk, and indicated that they were going to kill the cab driver. As Botsford got out of the car at the base, he asked them not to kill the victim.

Burger and Stevens drove the vehicle away, and then encountered a patrol vehicle. When the patrol vehicle went by, Stevens told Burger that they were going to "get burnt," and that they had to do something with the cab. Stevens told Burger to drive to a nearby pond. At the pond, Stevens directed Burger to wipe the fingerprints off the car. Stevens then directed Burger to put the car in gear and run it into the pond.

After doing this, Burger started to walk away and told Stevens he was leaving. Stevens told him he could not leave, "because we have to make sure—want to make sure the car goes down, with the man in the trunk."

In his cross-examination of Mr. Haire, Burger's counsel asked, "Now, your testimony to this jury as to what Burger told you—based on your testimony, is it not, as to what he said and what is contained in his statement, that Stevens was the one that said drive it to the pond, and Stevens more or less directed the whole operation, according to your testimony; is that correct?" Tr. at 297. The court sustained an objection to the question, stating to Burger's counsel: "You're getting into the province of the jury to determine the facts of the situation." *Id.* Burger's counsel then elicited from Mr. Haire the fact that Burger was only 17 years old at the time of the crime.

Mr. Botsford was the key witness for the state. On cross-examination by Burger's counsel, Mr. Botsford gave the following testimony:

> Q. Mr. Botsford, I think you were friends—you say you were friends with Chris Burger and Tom Stevens in boot camp?
>
> A. That's correct.
>
> Q. When they—when you got in the cab and you heard this voice or whatever it was in the back of the cab, did you know who that was?
>
> A. No, I didn't.
>
> Q. So you don't know of your own knowledge whether that was Roger Honeycutt or not; do you?
>
> A. I didn't know him by name. I knew it was the cab driver.
>
> Q. You just knew it was the cab driver back there?
>
> A. The cab driver of the cab.
>
> Q. Well, that's just because they told you it was; isn't that right?
>
> A. That's right.
>
> Q. And, the person that told you that was Stevens?
>
> A. That's correct.
>
> Q. In fact, Stevens was the one that was doing all the talking; wasn't he?
>
> A. Most of it.
>
> Q. And, Burger was just sorta going along, sorta doing sorta like Stevens was telling him to do; wasn't he?
>
> A. Sorta.
>
> Q. I think you said that when you said something about turning the cab driver loose, Burger agreed that was the thing that should be done?
>
> A. That's correct.

Tr. at 111.

A clinical psychologist testified that Burger had an IQ of 82, and that Burger lacked the motivation or power of reasoning to learn from previous experiences. Tr. at 247. The psychologist also testified that Burger was "functioning probably at the level of about a twelve year old person." Tr. at 248.

Finally, in closing argument at the guilt phase, Burger's counsel sought to emphasize the evidence that had been produced indicating that Stevens was in control of the cri[illegible]. Counsel said:

> One of the interesting things is the testimony here by Botsford was all about Stevens, what Stevens did, what Stevens said; not what Burger did or what Burger said. I would have thought and you may gather that we weren't trying Chris Burger here; we were trying Thomas Stevens. Don't convict Burger on what somebody said about Stevens, because Stevens is not on trial. Burger is on trial.

Tr. at 371-72.

It is clear from the foregoing that Burger's defense did not consist merely of putting the prosecution to its proof. Rather, Burger presented substantial evidence, and argument based on that evidence, that his participation in the crime was under the direction and control of Stevens. Stevens did virtually all the talking and gave all the orders. The crime and the killing were Stevens' ideas. Botsford testified that when Botsford suggested that the cab driver should be set free, *Burger agreed that this was what should be done.*

Burger's defense went squarely to the issue of whether he intended to kill the victim. I cannot agree with the majority that the evidence of Burger's intent to kill was overwhelming. In finding that Burger had the requisite intent, the jury might have relied on the faulty instruction that a person is presumed to intend the natural and probable consequences of his acts. I cannot say beyond a reasonable doubt that the faulty instruction did not contribute to the verdict obtained. *Davis, supra,* at 1521 n. 7. Accordingly, I dissent.

APPENDIX B

Denial of Rehearing En Banc in Burger v. Kemp

July 23, 1986

Christopher A. BURGER,
Petitioner-Appellee,
Cross-Appellant,

v.

Ralph KEMP, Warden, Georgia Diagnostic and Classification Center,
Respondent-Appellant, Cross-Appellee.

No. 81-7419.

United States Court of Appeals,
Eleventh Circuit.

July 23, 1986.

Appeal from the United States District Court for the Southern District of Georgia.

Before VANCE and JOHNSON, Circuit Judges, and ALLGOOD *, Senior District Judge.

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion March 13, 1986, 11 Cir., 785 F.2d 890).

PER CURIAM:

The panel opinion of March 13, 1986 should not be interpreted as requiring a defendant to place intent explicitly in issue before he can prevail on a challenge to burden shifting instructions on criminal intent. The panel majority simply noted that evidence of intent is more likely to be overwhelming where the defendant has not attempted to counter the state's evidence on criminal intent.

With the foregoing clarification of the panel opinion the petition for panel rehearing is DENIED and no member of this panel nor other judge in regular active service on the court having requested that the court be polled on rehearing en banc, Fed.R.App.P. 35, 11th Cir. Rule 26, the suggestion for rehearing en banc is DENIED.

Judge JOHNSON adheres to the views previously expressed in his dissent from the panel opinion.

* Honorable Clarence W. Allgood, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

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APPENDIX B

APPENDIX C

Burger v. Zant, 753 F.2d 930 (11th Cir. 1985)

Christopher A. BURGER,
Petitioner-Appellee,
Cross-Appellant,

v.

Ralph KEMP, Warden, Georgia Diagnostic and Classification Center,
Respondent-Appellant, Cross-Appellee.

No. 81-7419.

United States Court of Appeals,
Eleventh Circuit.

Feb. 5, 1985.

Death-sentenced defendant filed petition for writ of habeas corpus, alleging, inter alia, that he received ineffective assistance of counsel. The United States District Court for the Southern District of Georgia, B. Avant Edenfield, J., 513 F.Supp. 772, granted writ and vacated death sentence, and state appealed. The Court of Appeals, 718 F.2d 979, reversed and remanded. On certiorari, the United States Supreme Court, 104 S.Ct. 2652, vacated the judgment and remanded with instructions. The Court of Appeals, 741 F.2d 1274, remanded to the District Court with instructions. On remand, the United States District Court for the Southern District of Georgia, B. Avant Edenfield, J., found defendant's claim to be without merit. Defendant appealed. The Court of Appeals, adopting the District Court opinion, held that: (1) defense counsel's decision not to direct jury's attention to character-oriented mitigation evidence at defendant's capital sentencing trial was a product of reasonable strategic judgment and did not represent ineffective assistance of counsel, and (2) fact that defendant and codefendant were represented by attorneys who were partners and who worked together on the cases did not give rise to such conflict of interest as to deny defendant effective assistance of counsel.

Affirmed, remanded with instructions that writ be denied.

Johnson, Circuit Judge, dissented and filed opinion.

1. Criminal Law ⇐1208.1(6)

Within specified limits, Georgia prosecutors are permitted at capital sentencing trials to place defendant's character in issue through his prior record or other criminal acts; however, bad character evidence can be admitted only when defendant has been notified prior to trial that such evidence will be presented. O.C.G.A. § 17-10-2.

2. Criminal Law ⇐1208.1(5)

Under Georgia law, jury in capital sentencing trial may not consider nonstatutory aggravating circumstances unless it has found the existence of at least one statutory aggravating circumstance involved in the crime.

3. Witnesses ⇐274(1)

Aside from admissibility at capital sentencing trial of evidence of defendant's bad character, Georgia prosecutors may elicit further information damaging to the defendant when cross-examining character witnesses called by a defendant.

4. Criminal Law ⇐641.13(1)

Reasonableness of defense counsel's trial strategy should be viewed not in hindsight, but primarily in light of the information supplied to counsel by the defendant,

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APPENDIX C

for purposes of determining whether defendant received effective assistance of counsel. U.S.C.A. Const.Amend. 6.

5. Criminal Law ⇐641.13(7)

Defense counsel's decision not to direct jury's attention to character-oriented mitigation evidence at defendant's capital sentencing trial was a product of reasonable and strategic judgment that, in light of defendant's personality, introducing such evidence could needlessly open the door to disclosure of contrary character evidence on cross-examination; hence, performance prong of ineffectiveness claim was not satisfied, and prejudice prong need not be reached. U.S.C.A. Const.Amend. 6.

6. Criminal Law ⇐641.5

Attorney's freedom from conflict of interest is an important consideration in any examination of his effectiveness. U.S.C.A. Const.Amend. 6.

7. Criminal Law ⇐641.5

Mere fact that attorneys for defendant and codefendant were partners and assisted each other in the respective cases did not create such conflict of interest as would deny defendant effective representation of counsel; although it could be said that the two attorneys at times acted as one while each prepared for trial and appeal, any inducement of defendant's attorney to actively represent conflicting interests would be at best speculative, not actual, under the circumstances. U.S.C.A. Const.Amend. 6.

Appeals from the United States District Court for the Southern District of Georgia.

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

Before VANCE and JOHNSON, Circuit Judges, and ALLGOOD *, District Judge.

PER CURIAM:

Our previous consideration of the merits of this case resulted in reversal of the district court's grant of a writ of habeas corpus setting aside petitioner's death sentence. *Burger v. Zant*, 718 F.2d 979 (11th Cir.1983). In reaching our decision we adopted the district court's opinion, *Blake v. Zant*, 513 F.Supp. 772 (S.D.Ga.1981), with respect to three issues, including Burger's claim that he had been denied effective assistance of counsel.

The Supreme Court granted certiorari limited to one aspect of that issue, *i.e.*, Burger's claim that his trial counsel failed to investigate, prepare or present evidence for the sentencing phase of his capital trial. The Court concluded that the district court had apparently made a mistake in assessing the evidence on that aspect of the ineffectiveness of counsel issue. *Burger v. Zant*, — U.S. —, 104 S.Ct. 2652, 81 L.Ed.2d 360 (1984). It therefore vacated and remanded to this court for reconsideration, particularly in light of *Strickland v. Washington*, 466 U.S. —, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). — U.S. at —, 104 S.Ct. at 2653.

This court retained jurisdiction but remanded to the district court instructing it to extend or revise its findings and if

* Honorable Clarence W. Allgood, U.S. District Judge for the Northern District of Alabama sitting by designation.

appropriate, its conclusions and judgment. *Burger v. Zant*, 741 F.2d 1274 (11th Cir. 1984). On remand the district court reexamined Burger's claim and on October 10, 1984, entered its order holding the same to be without merit. A copy of the district court's order is made an appendix to this opinion. Following entry of the district court's order we allowed counsel to supplement their prior briefs.

[1–7] Upon reconsideration, we again adopt the appended order of the district court as our own opinion.

Our previous reversal of the district court's grant of the writ was based on the so called *Stephens* issue. 718 F.2d 981, 982. That issue is no longer before us. On the issue presently before us we affirm the district court's holding that Burger's petition is without merit. Accordingly, we again remand to the district court with instructions that the writ be denied.

REMANDED with instructions.

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA BRUNSWICK DIVISION

CHRISTOPHER BURGER, Petitioner

v.

WARDEN ZANT, ET AL., Respondents

CV280-114

ORDER

On limited remand from the Eleventh Circuit Court of Appeals, this Court has before it the task of examining petitioner Christopher Burger's claim that he received ineffective assistance of counsel at his second capital sentencing trial. At that trial, petitioner received a sentence of death.

I. *Background*

Mr. Burger's crimes, trials, appeals and habeas proceedings are detailed elsewhere in the record of this case. *See Burger v. State*, 242 Ga. 28, 247 S.E.2d 834 (1978) (murder conviction affirmed, sentence vacated, case remanded for resentencing), *Burger v. State*, 245 Ga. 458, 265 S.E.2d 796 (1980) (death sentence affirmed), *cert. denied*, 448 U.S. 913, 101 S.Ct. 31, 65 L.Ed.2d 1175 (1980), *Blake v. Zant*, 513 F.Supp. 772, 787–803 (S.D.Ga.1981) (writ denied as to conviction but granted as to death sentence), *rev'd*, *Burger v. Zant*, 718 F.2d 979 (11th Cir.1983), *reh'g en banc denied*, 726 F.2d 755 (11th Cir.1984), *cert. ed. Burger v. Zant*, — U.S. —, 104 S.Ct. 2652, 81 L.Ed.2d 360 (1984) (remanded with instructions), *Burger v. Zant*, 741 F.2d 1274 (11th Cir.1984) (limited remand to district court).

Previously, this Court concluded, *inter alia*, that petitioner was not denied effective assistance of counsel at his second sentencing trial. The Eleventh Circuit affirmed this Court as to this issue and adopted this Court's opinion as its own. *Burger v. Zant*, 718 F.2d at 981. On appeal, the United States Supreme Court vacated the opinion of the Eleventh Circuit and instructed it "to reconsider the effectiveness of counsel's assistance at petitioner's second sentencing and for further consideration in light of *Strickland v. Washington*, 466 U.S. —, [104 S.Ct. 2052, 80 L.Ed.2d 674] (1984)." 466 U.S. —, 104 S.Ct. 2652, 80 L.Ed.2d 674 (1984). The Supreme Court also noted that this Court

APPENDIX—Continued

may have mistaken the first sentencing transcript for the second sentencing transcript when it considered the reasonableness of counsel's decision not to present character evidence to the resentencing court.

Thereafter, the Eleventh Circuit remanded the case to this Court, with instructions to "address the matter to which specific reference was made by the Supreme Court[.]" 741 F.2d at 1275. The court of appeals also stated that this Court "is not limited to that question and shall make such findings as it deems appropriate in light of the Supreme Court's action." *Id.* at 1275.

II. *Conclusion*

In its original decision, this Court examined petitioner's "ineffective assistance" argument and enumerated six claims meriting discussion. 513 F.Supp. at 795. In light of the standards announced in *Washington*, this Court affirms its earlier decision as to claims two through four, as well as claim six; they provide no grounds for habeas relief. Claim one will be reexamined *infra*.

A. *Failure to Present Mitigating Evidence*

Turning to petitioner's fifth claim—that his counsel was ineffective because he failed to present mitigating evidence to the sentencing jury—the Court reviews the standards articulated in *Washington*, *supra*, and *United States v. Cronic*, — U.S. —, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). In *Washington*, the Supreme Court

> [e]stablished a two-prong test for analyzing ... [ineffective assistance] challenges. First, the defendant must establish that his counsel's performance "fell below an objective standard of reasonableness." *Id.* at —, 104 S.Ct. at 2065. Once that threshold is crossed, the defendant must then demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at —, 104 S.Ct. at 2068.

Green v. Zant, 738 F.2d 1529, 1536 (11th Cir.1984) (hereafter, *Green*); *see also Smith v. Wainwright*, 741 F.2d 1248 (11th Cir.1984); *Douglas v. Wainwright*, 739 F.2d 531, 533 (11th Cir.1984); *Boykins v. Wainwright*, 737 F.2d 1539 (11th Cir.1984); *Soloman v. Kemp*, 735 F.2d 395 (11th Cir. 1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome [of the trial]." *Boykins*, at 1543, quoting *Washington*, 104 S.Ct. at 2068. "Furthermore, a defendant must satisfy both the performance and prejudice prongs to successfully demonstrate an ineffective assistance claim. [*Washington*], at —, 104 S.Ct. at 2067. *Chadwick v. Green*, 740 F.2d 897, 900 (11th Cir.1984) (hereafter, *Chadwick*).[1] Courts need not address both of these components "if the defendant makes an insufficient showing on one." *Washington*, 466 U.S. at —, 104 S.Ct. at 2069, 80 L.Ed. at 699.

In addition, the *Washington* court emphasized that "a substantial burden of proof rests on a defendant who advances such a claim: the challenged proceeding enjoys a 'strong presumption of reliability.' *Id.* at —, 104 S.Ct. at 2069." *Boykins*, at 1543.

Finally, the Eleventh Circuit noted in *Green* that its

> [o]wn cases have established that '[e]ffective assistance does not mean errorless assistance, nor counsel judged ineffective by hindsight,' *Goodwin v. Balkcom*, 684 F.2d [794,] 804 [(11th Cir. 1982)], and our determination of whether petitioner was denied effective assistance 'must be based on the totality of circumstances in the entire record rather than on specific actions.' *United States v. Gibbs*, 662 F.2d 728, 730 (11th Cir.1981). Thus, even if we agree that any of petitioner's complaints against his counsel is well founded, this does not necessarily mean that constitutionally ineffective assistance has been established.

738 F.2d at 1536.

In its original Order, this Court did review the resentencing record but erroneously cited to the transcript of the first sentencing trial. Accordingly, the Court will again review the second sentencing transcript.

As he did at the first sentencing trial, attorney Alvin Leaphart decided not to direct the jury's attention to character-oriented mitigation evidence at petitioner's second sentencing trial. (Federal Habeas Hearing Record, hereafter, "R." 34, 73).

APPENDIX—Continued

Although he was aware of the fact that Georgia permits a broad scope of mitigating evidence to be admitted at capital sentencing trials (R. 34, 36), it was Leaphart's judgment "that the best approach was ... to argue the difference in [age between Burger and accomplice Thomas Stevens, as well as] the difference in their participation in the crime." (R. 34). In addition, he sought to "make the District Attorney prove his case[,]" (R. 18) by using the rules of evidence "to prevent [the prosecution] from doing so." (R. 18). The trial record reflects this strategy. *See, e.g.*, Tr. 65, 67, 95–6, 106–7, 109, 111, 117, 136, 1[illegible]81, 185–191.

Apparently in recognition of the range of evidence the State is permitted to present at sentencing trials (*see* note 6 *infra*), in addition to the strength of the evidence against his client, Leaphart decided to rely primarily on his closing argument to the jury. In his argument, Leaphart illuminated the acts of co-indictee Stevens[2] and minimized Burger's involvement in the murder and related crimes. He fully emphasized the fact that Stevens was twenty years old at the time of the crime, while Burger was only seventeen; that Stevens, the chief architect of the crimes, had considerable influence over petitioner. (Tr. 251, 253). He enumerated, as he did [illegible] first sentencing trial, the series of criminal acts committed by Stevens in contrast to the relatively fewer acts committed by Burger, who "was only following Stevens." (Tr. 250–253).

Next, Leaphart attempted to stimulate the jurors' religious sensitivities. (Tr. 256). He also argued that an "eye for an eye" was a notion popular with the people of

1. "In [*United States v.*] *Cronic*, [— U.S. —, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984)], the Court carved out a narrow exception to *Washington*'s general rule that a defendant must demonstrate prejudice: a showing of prejudice is not necessary if there are 'circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified.' — U.S. at —, 104 S.Ct. at 2048; *see also Washington*, 466 U.S. at —, 104 S.Ct. at 2065." *Chadwick*, 740 F.2d at 900. Examples of presumed prejudice would include cases where counsel was denied the right of effective cross-examination or 'where the defendant was denied counsel at a critical stage of the trial.' *Id.* No such exception is evident in the instant case.

2. Stevens and Burger were tried separately.

APPENDIX—Continued

Moses and of the old testament, but not with the people of today.[3] (Tr. 257–258).

Leaphart concluded his closing argument by re-emphasizing the contrast between the acts of Stevens and Burger, then asking the jury "[w]hat would Jesus Christ do if he were sitting in our shoes today?" (Tr. 259).

The outline above reflects the best strategy Leaphart felt was available to him. Interviews with Burger (R. 37), Burger's mother (R. 37, 44) and an attorney who had befriended Burger and his mother (R. 44), in addition to his consultation with a psychologist[4] (R. 14, 50) and review of psychologists' reports obtained through Burger's mother (R. 35–36, 44), convinced Leaphart that a more exhaustive investigation into Burger's background would not be a profitable pursuit.[5] He also concluded that presenting background and character evidence to the sentencing jury would have been at best unproductive (R. 34, 52), and at worst, harmful to his client (R. 73).

Leaphart decided to keep his client off the stand for a number of reasons. He testified that he was not able to keep Burger from talking about his crime to others. (R. 65). He believed that Burger enjoyed talking about the crime, *id.*, and he feared that petitioner would gloat about it on the stand. (R. 66). He did not believe that Burger's mother would be able to provide testimony sufficiently useful to warrant calling her to the stand. "[S]he could not add anything . . . other than being a mother and saying I don't want you to put my child in jail, or in the electric chair." (R. 68). He also feared that during cross-examination she would disclose unfavorable information about her son. *Id.*

In *Cape v. Francis*, 741 F.2d 1287 (11th Cir.1984), another Georgia state prisoner under sentence of death also sought habeas relief by alleging, *inter alia*, that he received ineffective assistance of counsel at the penalty stage of his trial.

The Eleventh Circuit did

> [n]ot detect any semblance of ineffectual representation during the penalty stage of the trial to support Cape's charge that his lawyer did not present sufficient mitigating evidence. Counsel investigated potential mitigating evidence and presented that which he felt would reflect favorably to his client. The mere fact that other witnesses might have been available or that other testimony might have been elicited from those who testified is not sufficient ground to prove ineffectiveness of counsel.

Id. at 1301.

It is true Cape's counsel presented some mitigating evidence while in the instant case petitioner's counsel presented no mitigating evidence. It is also true, however, that Leaphart's conversations with Burger, Burger's mother and family friend, together with his study of psychologists' reports, indicated to him that further investigation into this area would have been fruitless. Furthermore, and especially in light of his perception of Burger's personality, Leaphart, who had represented other death penalty defendants (R. 30, 58–59), feared opening the door to needless illumination of contrary character evidence by the prosecution on cross-examination. This Court's inquiry is therefore properly focused on the reasonableness of Leaphart's investigation and decision regarding this rejected strategy. In that regard,

> [s]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchangeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support *the limitations on investigation*. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

Washington, 466 U.S. at ——, 104 S.Ct. at 2066, 80 L.Ed.2d at 695 (emphasis added). Further focusing on what "limitations on investigation" would be evaluated in assessing the reasonableness of an attorney's performance, the Supreme Court emphasized that

> [w]hen a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable. In short, inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions. See *United States v. DeCoster*, 624 F.2d [196] at 209–210 [(D.C.Cir.1976)].

Washington, 466 U.S. at ——, 104 S.Ct. at 2066–2067, 80 L.Ed.2d at 696.

Leaphart testified that Burger never gave him the names of any witnesses that might have been helpful to him at trial. (R. 63). Despite this, Leaphart did consult, as mentioned above, with Burger's mother and volunteer "big brother," (R. 77) and reviewed reports written by Burger's former psychologists. He was unable to unearth background information sufficiently helpful to warrant further investigation, nor to sway his decision not to emphasize petitioner's character at the second sentencing trial.

Petitioner Washington, like petitioner Burger, also confessed to, *inter alia*, his involvement in the crimes of kidnapping and murder. Unlike Burger, Washington had pleaded guilty and relied on an earlier plea colloquy with the sentencing judge, who had commended Washington for tak-

3. The obverse side of this coin was applied by the prosecutor in *Cape v. Francis*, 741 F.2d 1287, 1301 n. 15 (11th Cir.1984).

4. The psychologist on whom Leaphart relied indicated that he would not be able to provide helpful testimony. (R. 50–51). Moving the trial court for appointment of additional psychiatric study would have been counterproductive, according to Leaphart, because he believed that the state court would have sent his client to a state hospital—one which, according to Leaphart, had a reputation for producing reports favorable to the prosecution. (R. 51).

5. Q. Did you make any attempt to talk to the other people that he had lived with during his life?

A. I couldn't—didn't know who they were. I knew that (Burger) had been in wherever he had come from to go in the Army. He had been—he had lived there. And, then his mother and father had separated at an early age as I recall. He was down in Florida for a while. Had gotten in some trouble down in Florida and then he went back up North where he lived and got in some trouble up there. And, then he ended up in the Army. And, very basically, I couldn't find anything in Mr. Burger's background which I felt would be helpful. You know, I could have put his mother up, I'm sure. And, she could have said some nice things about him. But, my feeling was that a lukewarm witness would have without any real thing to say would have possibly been harmful. And, I felt—I just decided not to do it.

(R. 59).

APPENDIX—Continued

ing responsibility for his crimes. In both cases, however, defense counsel were faced with evidence of their clients' confessions, the overwhelming strength of the evidence against their clients and aggravating circumstances surrounding the crimes. In preparing for the sentencing hearing in *Washington*, counsel spoke with the defendant's

> wife and mother, though he did not follow up on the one unsuccessful effort to meet with them. He did not otherwise seek out character witnesses for respondent. [cit]. Nor did he request a psychiatric examination, since his conversations with his client gave no indication that respondent had psychological problems.

466 U.S. at ——, 104 S.Ct. at 2057, 80 L.Ed.2d at 684.

As in the instant case, Washington's "[c]ounsel decided to look no further for evidence concerning respondent's character and emotional state. That decision reflected [*inter alia*,] trial counsel's sense of hopelessness about overcoming the evidentiary effect of respondent's confessions to the gruesome crimes." *Id.* The Supreme Court concluded that "[t]rial counsel could reasonably surmise from his conversations with [his client] that character and psychological evidence would be of little help .... Restricting testimony on [Washington's] character to what had come in at the plea colloquy ensured that contrary character and psychological evidence and [Washington's] criminal history, which counsel had successfully moved to exclude, would not come in." 466 U.S. at ——, 104 S.Ct. at 2071, 80 L.Ed.2d at 701.[6] In addition, the

6. Within specified limits, Georgia prosecutors are permitted at capital sentencing trials to place the defendant's character in issue through his prior record or other criminal acts. "All aspects of [a convicted felon's] crime or crimes, his character and his attitude are admissible, subject to the applicable rules of evidence regarding reliability, to guide the fact finder in determining appropriate sentence. *See Lockett v. Ohio*, 438 U.S. 586 [98 S.Ct. 2954, 57 L.Ed.2d 973 (1978)] [cits]. *Collier v. State*, [244 Ga. 553, 261 S.E.2d 364 (1979)]." *Fair v. State*, 245 Ga. 868, 268 S.E.2d 316, *cert. denied*, 449 U.S. 956, 101 S.Ct. 407, 66 L.Ed.2d 250, *reh'g denied*, 449 U.S. 1104, 101 S.Ct. 903, 66 L.Ed.2d 831 (1980); O.C.G.A. § 17-10-2. This may include "[a]ny lawful evidence which tends to show the motive of the defendant, his lack of remorse, his general moral character, and his predisposition to commit other crimes ... subject to the notice provisions of the statute .... [a] man [also] convicted ... of the defendant's attitude concerning his crime and the victim, the trier of fact's personal observation of the defendant, his conduct after incarceration and evidence of subsequent crimes." *Fair*, 245 Ga., at 873, 268 S.E.2d 316, quoted in *Zant v. Stephens*, 462 U.S. 862, —— n. 22, 103 S.Ct. 2733, 2748 n. 22, 77 L.Ed.2d 235, 256 n. 22 (1983); *see also id.*, 462 U.S. at ——, 103 S.Ct. at 2743, 77 L.Ed.2d at 251 ("But the Constitution does not require the jury to ignore ... possible aggravating factors [other than those specified in the sentencing statute] in the process of selecting ... those defendants who will actually be sentenced to death."); *Id.*, 462 U.S. at —— n. 17, 103 S.Ct. at 2743 n. 17, 77 L.Ed.2d, at 251 n. 17; *Godfrey v. Francis*, 251 Ga. 652, 660, 308 S.E.2d 806 (1983), *cert. denied*, — U.S. ——, 104 S.Ct. 1930, 80 L.Ed.2d 475 (1984).

However, bad character evidence can be admitted only "[w]hen the defendant ha[s] been notified prior to trial that such evidence will be presented." *Brown v. State*, 233 Ga. 843, 849, 220 S.E.2d 922 (1975). The evidence must be geared toward providing "[a]n *individualized* determination on the basis of the character of the individual and the circumstances of the crime." [*Stephens*, 103 S.Ct. at 2744 (emphasis in original)]. *Ritter v. Smith*, 726 F.2d 1505, 1515 (11th Cir.1984). In addition, the jury may not consider non-statutory aggravating circumstances unless it has found the existence of at least one statutory aggravating circumstance involved in the crime. *Stephens*, *Moore v. Zant*, 722 F.2d 640, 643-44 (11th Cir.1984); *see also McCleskey v. Zant*, 580 F.Supp. 338, 390 (N.D. Ga.1984). Such evidence must not be "constitutionally impermissible" or "totally irrelevant to the sentencing process." [*Stephens*, 103 S.Ct. at 2747]." *Moore*, at 643. Furthermore, "[t]he defendant is accorded substantial latitude as to the types of evidence he may introduce." *Gregg v. Georgia*, 428 U.S. 153, 164, 96 S.Ct. 2909, 2925, 49 L.Ed.2d 859 (1976), *reh'g denied*, *see also Readenour v. Wainwright*, 732 F.2d 803 (11th Cir.1984).

Nevertheless, there is no suggestion that State prosecutors may not elicit further information damaging to the defendant when cross-examining character witnesses called by a defendant. *See, e.g., Knighton v. Maggio*, 740 F.2d 1344, 1345 (5th Cir.1984).

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mitigating evidence "[a]t most ... show[ed] that numerous people who knew [Washington] thought he was generally a good person and that a psychiatrist and a psychologist believed he was under considerable emotional stress that did not rise to a level of extreme disturbance." *Id.*

In the instant case, counsel was faced with evidence of not only Burger's signed, but sworn confession (Tr. 151-153), to participation in a gruesome crime. This evidence was bolstered by, *inter alia*, eyewitness and tangible evidence. The crime included petitioner's depraved act of asking the victim if he "was all right" before petitioner drowned him. Similar to the setting in *Washington*, counsel in the instant case was convinced from what he learned from his investigation that no productive result would obtain from further pursuing Burger's background, even in light of Leaphart's knowledge that Burger had come from a broken home, *see Griffin v. Wainwright*, 588 F.2d 1549, 1562 (M.D.Fla. 1984), and that emphasizing character evidence would be the wrong strategy to employ. This judgment is not unreasonable, especially in light of the fact that calling a character witness to the stand is not "without risk; there are, almost invariably, unknown poisons to be hatched out of the mud by way of cross examination." *See, e.g., Knighton v. Maggio*, 740 F.2d 1344, 1448 (5th Cir.1984) (defense counsel not ineffective when he made "the value judgment that the gain to be expected from the favorable testimony of family witnesses would not justify the risk of the potential harm from unfavorable testimony expected on cross-examination."). The reasonableness of the decision should be viewed not in hindsight, but primarily in light of the information supplied by the defendant. *Washington*, 466 U.S. at ——, 104 S.Ct. at 2067, 80 L.Ed.2d at 696.

In *Collins v. Francis*, 728 F.2d 1322 (11th Cir.1984), Collins contended that his

> counsel was ineffective because he failed to investigate for possible use at the sentencing phase of his trial any evidence of mitigating circumstances. [Collins] allege[d] that counsel failed to look into his character and the record and background of his family. He also allege[d] that counsel failed to contact his relatives and friends regarding testimo-

2. In an affidavit submitted to this Court, petitioner's uncle avers that petitioner came from a broken home and that he was uncared for by his parents. He opined that Burger had a split personality. "Sometimes [Burger] would be a nice, normal guy, then at times he would ... go out and would get violent over nothing." Affidavit of Carmel R. Holtsclaw at 1-2; *see also* Affidavit of Cathy Russell Rix at 1 ("He had a hair-trigger temper. He would get mad and punch the wall. Once he broke his knuckles he got so mad."). On one hand, a jury could react with sympathy over the tragic childhood Burger endured. On the other hand, since Burger's sanity was not in issue in this case, the prosecution could use the same testimony, after pointing out that petitioner was nevertheless responsible for his acts, to emphasize that it was this same unpredictable propensity for violence which played a prominent role in the death of Burger's victim. *See* note 6, *supra*. "[M]itigation ..." after all, [m]ay be in the eye of the beholder." *Stanley v. Zant*, 697 F.2d 955, 969 & n. 11 (11th Cir.1983) (footnote omitted).

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ny they might have been able to give on the issues of guilt or punishment.

Id. at 1349.

Collins pointed to affidavits from friends who said they would have vouched for his good character at the trial. Collins' counsel stated "that Collins never gave him the names of such friends; consequently, he made no attempt to uncover any[.]" (*Id.*) and the habeas court gave credence to counsel's testimony. The Eleventh Circuit accepted this finding and this factor figured into its conclusion that Collins was not denied effective assistance of counsel.

In the instant case, this Court similarly finds that Burger did not provide his attorney with the names of those individuals apparently located by Mr. Leaphart's successors. It is true that petitioner's current attorneys were successful in finding other witnesses who could paint a tragic childhood background; it is also true that they were able to "elicit" a more compelling explanation of Burger's background from his mother than did Leaphart. (R. 74-87).[8] That post-death sentence attorneys with greater resources materialize to illuminate, through the use of hindsight, weaknesses in the strategy employed by pre-sentence attorneys equipped with comparatively fewer resources, was apparently recognized by the Supreme Court in *Washington*, when it emphasized that

> [j]udicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. *Cf. Engle v. Isaac*, 456 U.S. 107, 133-134, 71 L.Ed.2d 783, 102 S.Ct. 1558 [1574-1575] (1982).

Washington, 466 U.S. at ——, 104 S.Ct. at 2065, 80 L.Ed.2d at 694; see also *Stanley v. Zant*, 697 F.2d 955, 964 n. 7, *reh'g denied*, 706 F.2d 318 (11th Cir.1983); *Williams v. Maggio*, 679 F.2d 381, 392 (5th Cir.1982) (en banc).

As mentioned above, courts must accord "a heavy measure of deference to counsel's judgments" 466 U.S. at ——, 104 S.Ct. at 2066, 80 L.Ed.2d at 695, and pay heed to those instances where the defendant "has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful[.]" *Id.*, 466 U.S. at ——, 104 S.Ct. at 2066, 80 L.Ed.2d at 696. In such instances, "[c]ounsel's failure to pursue those investigations may not later be challenged as unreasonable." *Id.* Indeed,

> in his argument to the jury at the sentencing hearing, [Burger's] lawyer made the strategic choice to focus on policy considerations against the imposition of the death penalty rather than call attention to the character of the petitioner. We cannot discredit counsel's trial tactics in pursuing this course, taking into consideration the overwhelming evidence of guilt and the bizzare nature of the crime.

Cape v. Francis, 741 F.2d at 1301.

As was the Eleventh Circuit in *Cape*, this Court is "[m]indful of the many obstacles and pitfalls that confront lawyers in the defense of capital murder cases. The responsibilities and pressures are awesome. In retrospect, one may always identify shortcomings." *Id.*[9]

Indeed,

> [e]ffective counsel in a given case may consider the introduction of character evidence to be contrary to his client's interest. In other cases he may consider it unlikely to make much difference. In certain cases he may conclude that although available testimony might be minimally helpful, it would detract from the impact of another approach that he considers more promising .... [Counsel's] knowledge of local attitudes, his evaluation of the personality of the defendant and his judgment of the compatibility of the available testimony and the jury's impression of the defendant, his familiarity with the reactions of the trial judge under various circumstances, his evaluation of the particular jury, his sense of the 'chemistry' of the courtroom are ... all a few of the elusive, intangible factors that are not apparent to a reviewing court, but are considered by most effective counsel in making a variety of trial and pretrial decisions.

Stanley v. Zant, supra, 697 F.2d at 970.

In the instant case, it cannot be said that Leaphart's "[t]actical decision[ ] ... amount[s] to ineffective assistance[, as it is not] so ill-chosen as to render the trial fundamentally unfair. [*Washington*, 466 U.S. at ——, 104 S.Ct. at 2067, 80 L.Ed.2d at 696].'" *Solomon v. Kemp, supra*, 735 F.2d at 402. Furthermore, "'counsel for a criminal defendant is not required to pursue every path until it bears fruit or until all available hope withers.' *Lovett v. Florida*, 627 F.2d 706 (5th Cir.1980)." *Id.* This Court concludes that "[c]ounsel's strategic choice was well within the range of professionally reasonable judgments, and the decision not to seek more character ... evidence than was already in hand was likewise reasonable." *Washington*, 466 U.S. at ——, 104 S.Ct. at 2071, 80 L.Ed.2d at 701.

8. The *Collins* court also found significant the fact that counsel reasonably concluded that Collins' mother would not have made a favorable impact on the jury. In the instant case, Leaphart testified that after interviewing Burger's mother, he concluded that she would not have made any further impact on the jury except that degree of sympathy which might have been derived from her patience plea to the jury for mercy for her son. Furthermore, he did not deem it wise to risk possibly negative consequences from going into testimony. The Court does not find credible her assertion, made in response to a question asked by a post-death sentence attorney, that Leaphart never asked her about Burger's background. (R. 76).

9. *See Burger v. Zant*, 718 F.2d at 992-994 (Johnson, J. dissenting). In his dissent, Judge Johnson faulted Leaphart for "make[ing] a decision not to offer any evidence in mitigation in order to preserve his right to opening and closing arguments." *Id.* at 992. Judge Johnson concluded that "the basic assumption on which this strategy was based is patently unreasonable[.]" (*Id.*), since in the sentencing phase of the process there is no right of the defendant to open and close argument following the state's presentation of its evidence. O.C.G.A. § 17-10-2(c) (1982) (in the sentencing phase, "[t]he district attorney shall open and the defendant or his counsel shall conclude the argument."). With respect, this Court must disagree with Judge Johnson's conclusion. In response to questions aimed at illuminating Leaphart's conception of the particular jury's sense of the 'chemistry' of the courtroom and ... all a few of the elusive, intangible factors that are not apparent to a reviewing court, but are considered by most effective counsel in making a variety of trial and pretrial decisions.

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9. *See Burger v. Zant*, 718 F.2d at 992-994 (Johnson, J. dissenting). In his dissent, Judge Johnson faulted Leaphart for "make[ing] a decision not to offer any evidence in mitigation in order to preserve his right to opening and closing arguments." *Id.* at 992. Judge Johnson concluded that "the basic assumption on which this strategy was based is patently unreasonable[.]" (*Id.*), since in the sentencing phase of the process there is no right of the defendant to open and close argument following the state's presentation of its evidence. O.C.G.A. § 17-10-2(c) (1982) (in the sentencing phase, "[t]he district attorney shall open and the defendant or his counsel shall conclude the argument."). With respect, this Court must disagree with Judge Johnson's conclusion. In response to questions aimed at illuminating Leaphart's conception of all knowledge and capabilities in handling ... and cases, Leaphart indicated that "[i]n the ... in the normal [case, guilt-innocent phase of the case],[ ]" he felt that the presentation of witness testimony would not have been worth the loss of his duties to open and close during the final argument phase of the trial. (R. 87) (emphasis added). O.C.G.A. § 17-8-71 (1982) specifies that "[i]f the defendant introduces no evidence, his counsel shall open and conclude that argument to the jury after the evidence on the part of the state is closed." Where a defendant does present evidence, he loses his right to open and close. *See, e.g., Hubbard v. State*, 167 Ga.App. 32, 305 S.E.2d 849 (1983). In fairness to Judge Johnson, the Court recognizes that it incorrectly applied this distinction in its original Order. *See Blake v. Zant*, 513 F.Supp. at 798.

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Because petitioner's showing is insufficient as to the performance prong of the *Washington* test, it is not necessary to address the prejudice prong. *Washington*, 466 U.S. at ——, 104 S.Ct. at 2071, 80 L.Ed.2d at 702 ("[f]ailure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim.").

Accordingly, petitioner's claim that his counsel was ineffective because he failed to present mitigating evidence at his second sentencing trial is DENIED. "[On this particular claim, petitioner] has made no showing that the justice of his sentence was rendered unreliable by a breakdown in the adversary process caused by deficiencies in counsel's assistance." *Id.*

B. *Conflict of Interest*

Since an attorney's freedom from conflict of interest is an important consideration in any examination of his effectiveness (*see Burger v. Zant*, 718 F.2d at 987–991 (Johnson, J., dissenting)), the Court will revisit its earlier conclusion. This claim is best analyzed by first examining what was and was not actually present in this litigation. As noted above, Burger and coindictee Stevens were tried separately. Each was represented by appointed counsel. Burger's counsel did employ a strategy adverse to Stevens' interests when he emphasized Stevens' greater culpability in the crime.

On the other hand, Stevens' counsel was also Leaphart's partner, Robert B. Smith. (R. 13–14). It is undisputed that the two lawyers made an attempt to construct a "Chinese Wall" between themselves. In fact, in varying degrees, they worked together on both cases at the trial and appellate levels. (R. 18, 49–11). Smith sat in with Leaphart on Burger's case, but Leaphart did not involve himself with Stevens' trial, which followed Burger's. (R. 18).

Leaphart was questioned on what effect, if any, his collaboration with Smith had on his resolve to represent Burger.

THE COURT: Did you pull any punches in order to protect Stevens?

A. No.

THE COURT: If crucifying Stevens would have helped Burger, would you have done it?

A. Yes, sir.

Q. Did you do it?

A. Didn't have the opportunity.

(R. 53).

As mentioned above, Leaphart did emphasize Stevens' greater culpability in the crime. He also investigated Stevens to ascertain what, if anything, might be useful to his defense of Burger. (R. 54). In addition, he constantly attempted to plea bargain with the prosecutor in the case. (R. 65). However,

> A. [d]uring the first trial [the prosecutor] just flatly refused to even discuss it in any terms. And, then when we got it reversed on the sentence feature I continued to—in that time to try to negotiate with the—the district attorney about entering a plea, for Mr. Burger to serve a life sentence. And, he insisted on trying it and insisted on seeking the death penalty.

Id.

The prosecutor's flat refusal to engage in plea bargaining is not surprising when viewed in light of the strength of the case against Burger. As mentioned above, this evidence included Burger's signed, sworn confession (Tr. 151–155), which was complied with a *Miranda* waiver (Tr. 291–293),

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along with eyewitness and tangible evidence. In addition, there is no suggestion that this evidence was not available to be used against Stevens. This background provides suitable perspective to the following examination by petitioner's federal habeas attorney:

> Q. Mr. Leaphart, did at any time during the representation did you talk to the District Attorney about the possibility of Mr. Leaphart (sic) testifying against Mr. Stevens?
>
> A. You mean Mr. Burger?
>
> Q. Mr. Burger, excuse me.
>
> A. No.
>
> Q. There was no discussion of his testimony in exchange for a lighter sentence for Mr. Burger?
>
> A. No, sir.

(R. 38–39).

Since the prosecution "flatly refused to even discuss" plea bargaining, it follows that Leaphart would not have talked to the prosecutor about offering his client's testimony against Stevens.

Leaphart testified that at no time did he believe a conflict of interest to exist in the case during the trials and appeals. (R. 62). Finally, the conflict of interest issue was never raised at the trial level. (R. 15).

The standards for reviewing a conflict of interest claim are well settled.

> For a conflict of interest to cause representation to fail Sixth Amendment standards, the conflict must be actual, not speculative. *United States v. Alvarez*, 626 F.2d 1307, 1309 (11th Cir.1980), *cert. denied*, 464 U.S. 967, 104 S.Ct. 1578, 79 L.Ed.2d 909 (1983). *Batts v. Balkcom*, 661 F.2d 391, 395 (5th Cir. Unit B 1981), *cert. denied*, 456 U.S. 1011, 102 S.Ct. 2307, 73 L.Ed.2d 1308 (1982). "[A] defendant shows that his counsel actively represented conflicting interests; he has not established the constitutional predicate for his claim of ineffective assistance. *Batts v. Balkcom*, *supra*, at 39

United States v. Ard, 731 F.2d 718, 72 727 (11th Cir.1984); *Westbrook v. Za* 704 F.2d 1487, 1499 (11th Cir.1983); *Uni States v. Mers*, 701 F.2d 1321, 1328 (1 Cir.), *cert. denied*, — U.S. —, 104 S. 481, 78 L.Ed.2d 679 (1983); *see also R ham v. United States*, 724 F.2d 1529 (1 Cir.1984) (not all conflicts are so egre as to constitute a Sixth Amendment viola Judge Johnson stated that Leaphart a Smith acted as one attorney, that Leaph in effect represented both Burger and Stevens. 718 F.2d at 988. Setting aside t fact that Burger and Stevens received se arate trials, the Court turns to *Unit States v. Carr*, 740 F.2d 339 (5th Cir.19 where the Fifth Circuit stated that

> "[a] conflict of interest is present whenever one defendant stands to gain significantly by counsel adducing probative evidence or advancing plausible arguments that are damaging to a codefendant whom counsel is also representing [citc] In assessing whether or not such conditions are present in a particular case the attorney representing both defendants "is in the best position professionally and ethically to determine when a conflict of interest exists . . ." *Cuyl [v. Sullivan]*, 446 U.S. [335] at 347 [1 S.Ct. 1708, 1717, 64 L.Ed.2d 333] [citi

740 F.2d at 344.

The mere fact that the attorneys assist each other in Burger and Stevens' ca does not convince this Court that a conf of interest has been shown. Although may be said that the two attorneys at tim

APPENDIX—Continued

acted as one while each prepared for trial and appeal, any inducement of Leaphart to actively represent conflicting interests—"to pull any punches" in his representation of Burger—would be at best speculative, not actual. There has been no showing that Leaphart "made a choice between possible alternative courses of action, such as eliciting (or failing to elicit) evidence helpful to one client but harmful to the other." *Mers*, 701 F.2d at 1328. In fact, Leaphart testified that he neither felt nor recognized the existence of a conflict of interest when he represented Burger. (R. 62). Nor can it be said that the overlap of counsel, to the extent it existed, infected Leaphart's representation so as to constitute an "active representation of conflicting interests." *Cuyler v. Sullivan*, 446 U.S. 335, 350, 100 S.Ct. 1708, 1719, 64 L.Ed.2d 333 (1980).

Accordingly, the Court affirms its earlier conclusion that petitioner is not entitled to relief on this ground.

To summarize, petitioner's claim that his attorney provided ineffective assistance of counsel at the second sentencing trial in this case is without merit. In addition, no conflict of interest on the part of his attorney has been shown.

SO ORDERED, this 10 day of October, 1984.

/s/ B. Avant Edenfield
JUDGE, UNITED STATES
DISTRICT COURT
SOUTHERN DISTRICT
OF GEORGIA

JOHNSON, Circuit Judge, dissenting:

I dissent from the majority's adoption of the district court order denying Burger's claim that he was deprived of effective assistance of counsel. A review of the record reveals that Burger was denied the effective assistance of counsel by both his appointed counsel's active representation of his co-indictee's conflicting interest and his counsel's failure to present any evidence on his behalf at either of his two sentencing proceedings.

The general principles applicable to ineffective assistance of counsel claims were articulated in *Strickland v. Washington*, — U.S. —, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *See also King v. Strickland*, 748 F.2d 1462 (11th Cir.1984). To demonstrate that the assistance provided by counsel was so deficient as to require reversal, a defendant must make a two-pronged showing. First, he must demonstrate that his counsel made errors so serious that he was not functioning as the "counsel" guaranteed by the Sixth Amendment. *Id.* at 2064. Such errors must be outside the generous range given to "reasonable professional judgment." *Id.* at 2066. Second, the defendant must demonstrate that he was prejudiced by the deficient performance. To meet this portion of his burden, defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 2068. A court reviewing an ineffective assistance claim, however, must bear in mind that

> the ultimate focus of inquiry must be on the fundamental fairness of the proceeding. In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system relies on to produce just results.

Id. at 2069.

The Court in *Strickland v. Washington* also considered the showing that is required when a defendant argues that counsel was ineffective by reason of conflict of interest.[1] Where counsel breaches the duty of loyalty to his client, a limited presumption of prejudice applies. *Strickland v. Washington, supra*, 104 S.Ct. at 2067; *Cuyler v. Sullivan*, 446 U.S. 335, 345–350, 100 S.Ct. 1708, 1716–1719, 64 L.Ed.2d 333 (1980). Prejudice is presumed if the defendant can demonstrate that counsel "actively represented conflicting interests" and "that an actual conflict of interest adversely affected his lawyer's performance." *Strickland v. Washington, supra*, 104 S.Ct. at 2067; *Cuyler v. Sullivan, supra*, 446 U.S. at 350, 348, 100 S.Ct. at 1719, 1718.

Turning first to Burger's conflict of interest claim, the record is clear that Burger's counsel actively represented both Burger and Stevens. Both Burger and Stevens were charged with and indicted for the murder of Roger Honeycutt. Both were appointed counsel by the trial court at approximately the same time. Burger's appointed counsel, Leaphart, and Stevens' appointed counsel, Smith, were partners in a two-partner law firm. At the federal habeas hearing, Leaphart testified that he interviewed both Burger and Stevens. Leaphart also testified that he assisted Smith in the preparation of Stevens' case and that Smith assisted him in the preparation of Burger's case. Both lawyers discussed the issues involved in each case and researched the law together.[2] Smith and Leaphart collaborated in preparing the briefs for both Burger and Stevens on each defendant's first appeal to the Supreme Court of Georgia; Leaphart testified that he "primarily" prepared the briefs for Burger and Stevens on the second appeal to the Supreme Court of Georgia.[3] The fee received by each attorney for representing each client was deposited in the law firm's corporate account. At no time in his representation of Burger did Leaphart or the trial court ever inform Burger of a possible conflict of interest.

Whether analyzed as a situation where one attorney, Leaphart, represented both Burger and Stevens,[4] or where one law firm represented both Burger and Stevens,[5] the end result was that Leaphart

1. The Sixth Amendment guarantee of effective assistance of counsel necessarily includes the guarantee of conflict-free counsel. *Glasser v. United States*, 315 U.S. 60, 70, 62 S.Ct. 457, 464, 86 L.Ed. 680 (1942); *United States v. Alvarez*, 580 F.2d 1251, 1254 (5th Cir.1978).

2. Transcript of Federal Habeas Corpus Hearing ("THC") at 18.

3. THC at 40–41.

4. The warden-appellant argues that the conflict of interest cases relied upon by Burger are inappropriate as involving the representation of multiple defendants by one attorney. Here, appellant contends, Burger and Stevens were represented by "separate" attorneys. The argument is contrary to the facts as reflected by the record. Leaving aside the fact that Leaphart and Smith were partners in the practice of law, the attorneys here were each active in the defense of the other's client and "seem to have viewed themselves as a defense 'team' acting on behalf of [both] of the accused." *United States ex rel. Sullivan v. Cuyler*, 593 F.2d 512, 515 (3d Cir. 1979), *rev'd on other grounds, Cuyler v. Sullivan*, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). Leaphart consulted confidentially with Stevens, aided in preparing his case for trial, and prepared the briefs for both of his appeals. "Whatever may have been the extent of each attorney's participation in the trial of the defendants, we are satisfied that it was sufficient to establish that both attorneys represented [both] defendants." *Id.*

5. "The same principles [governing Sixth Amendment conflict of interest claims] apply where the joint representation is by two members of the same firm." *Ross v. Heyne*, 638 F.2d 979, 983 (7th Cir.1980) (quoting *United States v. Hilton*, 471 F.Supp. 397, 399 n. 1 (S.D.N.Y.1979)).

was actively involved in the defense of both to the extent that a conflict of interest was clearly established.

Although multiple representation is the paradigm context in which conflict of interest claims arise,[5] a finding of multiple representation alone does not establish ineffective assistance of counsel. The conflict must be shown to be actual, not merely speculative, before representation will violate Sixth Amendment standards. *Baty v. Balkcom*, 661 F.2d 391, 397 (5th Cir. Unit B 1981). "An actual conflict of interest occurs when a defense attorney places himself in a situation 'inherently conducive to divided loyalties.' " *Zuck v. Alabama*, 588 F.2d 436, 439 (5th Cir.1979) (*quoting Castillo v. Estelle*, 504 F.2d 1243, 1245 (5th Cir.1974)); *see also Baty v. Balkcom*, *supra*, 661 F.2d at 397 ("[a]n actual conflict of interest exists if counsel's introduction of probative evidence or plausible arguments that would significantly benefit one defendant would damage the defense of another whom the same counsel is representing ").

In this case the fundamental issue framed by counsel was not Burger's guilt but the extent of his culpability. At the habeas corpus hearing, Leaphart exhaustively reviewed the evidence that the extent of Burger's culpability was less than that of Stevens.[7] In sum, this evidence was as follows. At the time the crime was committed, Burger was seventeen; Stevens was twenty. Burger has an I.Q. of 82 and possible brain damage. Stevens appeared to be the leader in their relationship; Burger was the follower. Stevens planned and initiated the robbery of the victim; Burger followed his instructions. Stevens actually committed the robbery; Stevens made the victim undress; Stevens forced the victim to perform oral sodomy on Stevens; Stevens anally sodomized the victim; Stevens tied the victim up and forced him to get in the trunk of the cab. Stevens told Burger they would have to kill him; Burger said he didn't want to kill him. Stevens told Burger they would have to get rid of the cab by driving it into the pond; Stevens ordered Burger to drive the cab with the victim locked in the trunk into the pond. Burger drove the cab and the victim into the pond. In short, the essence of Burger's defense was that he was less culpable than Stevens.

In this situation, any evidence or arguments made by counsel in Burger's behalf would, by the very nature of Burger's defense, damage Stevens. Such adversity in the interests of Leaphart's clients demonstrates that an actual conflict of interest existed. *See Zuck v. Alabama*, *supra*, 588 F.2d at 439 (adversity sufficient to demonstrate actual conflict of interest exists if "the attorney owes a duty to the defendant to take some action that could be detrimental to his other client").

The evidence provided by petitioner also demonstrates that this conflict "adversely affected his lawyer's performance." *Strickland v. Washington*, *supra*, 104 S.Ct. at 2052. On several occasions, Leaphart refrained from taking actions in support of Burger that would have been detrimental to Stevens. For example, at no time in his representation of Burger did Leaphart offer Burger's testimony against Stevens in exchange for a sentence less than the death penalty for Burger.[8] *See Baty v. Balkcom*, *supra*, 661 F.2d at 397 N. 12 ("[p]lea bargains are perhaps the most obvious example of the manifest effects of a conflict of interest at pretrial proceedings."); *see also Fleming v. State*, 246 Ga. 90, 270 S.E.2d 185, 189 (Bowles, J., concurring) ("[n]o two defendants share equal responsibility for a crime. Usually one is more culpable than the other or for any number of reasons has a greater degree of responsibility for what occurred. One may also be more entitled to leniency based on such factors as age, intelligence, motive, background, previous conduct or record, etc. Common counsel eliminates any practical possibility of plea bargaining."). The district attorney's disinclination to plea bargain did not stop Leaphart from "constantly attempting" to bargain for a life sentence; there is no reason to say it should have deterred him from making the more attractive offer of Burger's testimony against Stevens. Moreover, at Burger's trial Stevens was not called as a witness by the defense. Finally, Leaphart prepared the briefs for both Burger and Stevens on each defendant's second appeal to the Supreme Court of Georgia. In Burger's brief, Leaphart does not argue that he was the less culpable party, although the scope of the Supreme Court of Georgia's appellate review in capital cases includes a consideration of whether the "sentence of death is excessive or disproportionate to the penalty in similar cases, considering both the crime and the defendant." O.C.G.A. 17-10-35(c)(3) (1982), formerly Ga.Code Ann. 27-2537(c)(3) (19 ").

Once a defendant has made the [illegible] showings required by *Strickland v. Wash-*

see also United States v. Donahue, 560 F.2d 1039, 1042 (1st Cir.1977) ("[t]he same rule applies with equal force to representation of two or more defendants by members of the same law firm."). *Cf. Zuck v. Alabama*, 588 F.2d 436, 438 (5th Cir.1979) (ineffective assistance found where "[t]he law firm which served as counsel to Zuck in his murder trial also represented, in an unrelated civil matter, the state prosecutor who tried Zuck."); Fed.R.Crim.Pro. 44(c) ("[w]henever two or more defendants have been jointly charged . . . and are represented by . . . retained . . . appointed counsel who are associated in the practice of law, the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of his right to the effective assistance of counsel, including separate representation."); *construed in Ross v. Heyne*, 638 F.2d at 983 ("[t]he Supreme Court's proposal of this rule indicates its recognition that the potential constitutional problems attendant to multiple representation are present when different attorneys from the same legal partnership represent co-defendants with conflicting interests."); *ABA Code of Professional Responsibility* DR 5-105(d). Further, the Supreme Court of Georgia, exercising its supervisory role over the Bar, has adopted a mandatory rule in death penalty cases that co-defendants must be provided with separate and independent counsel. *Hewing v. State*, 264 Ga. 90, 270 S.E.2d 185 (1980). This rule applies with equal force to representation by a single attorney or by members of the same law firm. *Id.* at 188 n. 7.

6. *See Cuyler v. Sullivan*, 446 U.S. at 348, 100 S.Ct. at 1718 ("[a] possible conflict of interest inheres in almost every instance of multiple representation"); *United States v. Alvarez*, 580 F.2d 1251, 1254 (5th Cir.1978).

7. THC at 20-53.

8. At the federal habeas hearing, Leaphart testified that he had not, at any time during his representation of Burger, discussed with the district attorney the possibility of Burger's testifying against Stevens in return for a lighter sentence. THC at 38-39. When further questioned about plea negotiations in Burger's case, Leaphart testified that he had engaged in plea negotiations, but that "*during the first trial* [the district attorney] refused to discuss it on any terms." THC at 65 (emphasis supplied). From this account it appears that plea negotiations were entered into in this case, that Leaphart never offered Burger's testimony against Stevens, and that, after Burger's first trial had begun, the district attorney refused to discuss a plea on whatever terms Leaphart had offered, presumably not the terms of Burger's testimony against Stevens since Leaphart testified he did not at any time make such an offer. Thus, appellant's argument that no *pretrial* conflict of interest could have arisen due to the district attorney's refusal to plea bargain is contradicted by the record.

ington, supra, prejudice is presumed. 104 S.Ct. at 2067. *See also Westbrook v. Zant*, 704 F.2d 1487, 1499 (11th Cir.1983); *Baty v. Balkcom, supra*, 661 F.2d at 395 ("when counsel is confronted with an actual conflict of interest, prejudice must be presumed, and except under the most extraordinary circumstances, the error cannot be considered harmless") (*quoting Turnquest v. Wainwright*, 651 F.2d 331, 334 (5th Cir. 1981)). Even accepting the district court's finding, adopted by the majority in this case, that Leaphart did not "tailor[ ] his [trial] strategy toward protecting Stevens," there is sufficient evidence of an actual conflict and of tangible adverse effect on Leaphart's performance establish a Sixth Amendment violation.[9]

Burger also argues that he was denied the effective assistance of counsel because Leaphart failed adequately to investigate possible mitigating evidence or to present *any* evidence, in mitigation or otherwise, at either of his two sentencing proceedings. Counsel's duty of effective representation continues into the sentencing phase of his client. *See Stanley v. Zant*, 697 F.2d 955, 963 (11th Cir.1983) ("The special importance of the capital sentencing proceeding gives rise to a duty on the part of defense counsel to be prepared for that crucial phase of the trial."). At the core of the duty of effective representation is the "independent duty to investigate and prepare." *Goodwin v. Balkcom*, 684 F.2d 794, 805 (11th Cir.1982). To fulfill this obligation, counsel must make reasonable investigations or make a reasonable decision that makes further investigation unnecessary. *Strickland v. Washington*, 104 S.Ct. at 2066. An examination of the relevant facts suggests that Leaphart failed in both his duty of investigation and his duty of representation at the sentencing proceeding.

The district court found that Leaphart's investigation into available mitigating evidence consisted solely of conversations with Burger's mother and an attorney who had befriended her. Although the content of those conversations and the identity of possible character witnesses were not clear, the district court concluded that Leaphart made "adequate if hardly ideal inquiries" and that his "investigation appears to meet at least minimal professional standards." Such an investigation should not be characterized as reasonable or substantial. Moreover, even the scant amount of information which was unearthed through Leaphart's investigation was not presented in the proceeding itself. Nor can it be said that Leaphart's choice to curtail investigation and to present no evidence at the sentencing proceedings was a reasonable strategic decision based on reasonable assumptions. Leaphart has attempted to justify his approach by reference to three strategies or assumptions: 1) that Leaphart's theory of defense, or strategy, was to make the state prove its case; 2) that, if mitigating evidence had been offered at Burger's sentencing proceedings, Leaphart would have lost the right to opening and closing argument; and 3) that Leaphart chose to rely in closing on the argument that Burger had never been in trouble be-

9. The district court appears to take the position that it would not be possible to make a full demonstration of prejudice of the type, for example, that is required for general ineffective assistance claims under *Strickland v. Washington*. Whether or not such a showing would be possible is not relevant, however, to the issue of conflict of interest. In conflict of interest cases, as noted above, a limited presumption applies on a showing of some "adverse effect" on the lawyer's performance, which has been amply demonstrated on the instant case.

fore, which would have been undercut by an investigation into and testimony concerning Burger's background. Even conceding that broad range must be given to the operation of professional judgment, *Strickland v. Washington*, 104 S.Ct. at 2065–66, none of these strategies or assumptions withstand scrutiny for reasonableness.

Leaphart testified concerning his strategy or theory of defense in Burger's case:

> Well, of course, my theory of defense was of course trying to make the District attorney prove his case. And my theory of defense was to—well, that in effect in essence what it was. And, use whatever rules of evidence and to prevent him from doing so.[10]

And, specifically concerning the second trial solely on the issue of penalty, Leaphart again testified that he "felt that case should have been tried on the facts and make the District Attorney—I say make him, use whatever rules of evidence to exclude those harmful facts."[11] The law provides that the state must prove its case, whether defense counsel is present or not. Relying on the state's case is not a "strategy" for the defense, but rather reflects an abandonment of counsel's obligation to develop a case for his client. This proffered strategy is tantamount to no strategy at all; and reliance on such a strategy in a capital sentencing proceeding, as an alternative to investigating and presenting available mitigating evidence, is patently unreasonable.

Second, Leaphart testified that he made a decision not to offer any evidence in mitigation in order to preserve his right to opening and closing arguments. As the basic assumption on which this strategy was based is patently unreasonable. O.C.G.A. 17-10-2(a) & (c) (1982), formerly Ga.Code Ann. 27-2503(a) & (c) (1933), provide for the conduct of sentencing proceedings in capital cases: "The district attorney shall open and the defendant or his counsel shall conclude the argument." The presentation of evidence by the defendant at a capital sentencing proceeding in no way affects this division of argument between the state and the defense. In fact, this procedure was followed at Burger's sentencing proceedings: the district attorney opened and the defense closed final arguments to the jury. Leaphart simply failed to inform himself of basic Georgia criminal procedure in sentencing proceedings. *Cf. Young v. Zant*, 677 F.2d 792 (11th Cir. 1982). No strategy based on such a false assumption is reasonable. The district court clearly erred in concluding otherwise.[12]

The district court also found that Leaphart's failure to substantially investigate mitigating evidence was based on a strategic choice to rely in closing argument on the "major argument" in Burger's behalf that he had no prior record of violent crime and had never been in trouble before. Insofar as it relates to Burger's second sentencing proceeding, this finding is contradicted by the record: at no point in his closing argument did Leaphart mention the lack of evidence that Burger had a record or had been in trouble before. Instead, Leaphart's closing argument at the second sentencing pro-

10. THC at 18.

11. THC at 52.

12. The district court's explanation that Leaphart's rationale was appropriate in the context of the culpability trial provides no justification for its application in the context of a sentencing proceeding where, as noted above, the Georgia procedural rules are different.

ceeding stressed Burger's comparative lack of culpability and asked for the jury's mercy. This argument would not have been undercut by the presentation of humanizing evidence concerning Burger's background.

In short, Leaphart's decision neither to conduct substantial investigation nor to present any evidence at the sentencing proceedings was not a reasonable strategic choice. It was, moreover, readily distinguishable from the choices made by attorneys in those cases relied upon by the district court. In *Cape v. Francis*, 741 F.2d 1287 (11th Cir.), the district court found that petitioner's attorney presented some mitigating evidence during the sentencing proceeding; and in *Strickland v. Washington*, *supra*, petitioner's attorney relied on character testimony that had come in at an earlier plea colloquy. 104 S.Ct. at 2071. Leaphart's presentation of no evidence in the instant case is different; it represented an error "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland v. Washington*, *supra*, 104 S.Ct. at 2064.

But the Sixth Amendment inquiry does not end with a finding of unreasonable performance by counsel. Burger may prevail only if he shows both a denial of effective assistance and actual prejudice to the course of his defense. *Id.* In this case, however, prejudice is apparent.

At the federal habeas hearing, Burger offered the testimony of his mother and numerous affidavits concerning his troubled childhood and background. This evidence demonstrated that Burger's parents had been married when his mother was fourteen and his father was sixteen. His parents divorced when he was a child. Neither parent wanted Burger and his childhood was spent being shuffled between the two. His father threw him out of the house; his mother sent him back to live with his father. Burger's mother remarried. Burger's stepfather beat Burger, and beat Burger's mother in his presence; Burger's stepfather involved him in drugs and alcohol when he was eleven years old. Burger's mother and stepfather moved from Indiana to Florida. Burger was sent to live with his father. Burger's father beat him and refused to have anything to do with him. Burger ran away and hitchhiked to Florida to live with his mother, selling his shoes to buy food along the way. When Burger arrived barefoot in Florida, his stepfather told him he could not stay with them. Burger's mother told juvenile authorities that she didn't want him, and to send him back to his father in Indiana. When Burger arrived in Indiana, his father locked him out of the house. Burger was taken in by a neighbor, as he had nowhere else to go. The clinical psychologist who examined Burger testified at a motion hearing that Burger had an I.Q. of 82 and possible brain damage.

I cannot accept the holding that the failure to present this evidence was not prejudicial to Burger. The district court found that, although the affidavits of the character witnesses supplied by Burger at the hearing do "contain references to a difficult childhood which might have created some sympathy for Mr. Burger," they also contained references to drug abuse, juvenile probation and violence. However, the thrust of the character testimony offered by Burger was not that Burger was a model citizen, but that Burger's personality and motivation could be explained by his unusually stormy childhood. Although this is precisely the kind of humanizing evidence that "may make a critical difference, especially in a capital case." *Stanley v. Zant*, *supra*, 697 F.2d at 969, Leaphart elected neither to conduct further investigation nor to use the evidence at the sentencing proceeding. Having heard the state's case, unmitigated by any evidence presented on behalf of petitioner, two sentencing juries recommended the death penalty.

Failure to present this substantial, available mitigating evidence meets the prejudice prong of *Strickland v. Washington*, *supra*. In fact Leaphart's failure to investigate or to present evidence on his client's behalf is an apt example of the kind of "breakdown in the adversarial process," *id.* at 2069, that requires a reviewing court to find the results of a proceeding unreliable.

For these reasons, I would reverse the district court's finding that Burger was afforded the effective assistance of counsel during his state court proceedings and remand this case with directions to grant the writ.

APPENDIX D

Burger v. Zant, 718 F.2d 979 (11th Cir. 1983)

Christopher A. BURGER, Plaintiff-Appellee, Cross-Appellant,

v.

Walter A. ZANT, Warden, Georgia Diagnostic and Classification Center, Defendant-Appellant, Cross-Appellee.

No. 81-7419.

United States Court of Appeals, Eleventh Circuit.

Oct. 13, 1983

Defendant was convicted of murder, and on appeal, Georgia Supreme Court, 242 Ga. 28, 247 S.E.2d 834, affirmed conviction but vacated death sentence and remanded for resentencing. On remand, defendant was again sentenced to death, and Georgia Supreme Court, 245 Ga. 458, 265 S.E.2d 796, affirmed. After United States Supreme Court denied certiorari, defendant filed petition for writ of habeas corpus, and United States District Court for the Southern District of Georgia, B. Avant Edenfield, J., 513 F.Supp. 772, granted writ and vacated death sentence, and state appealed. The Court of Appeals, Vance, Circuit Judge, held that: (1) where one of three aggravating circumstances remained valid, fact that other two were reversed as erroneous did not render entire verdict invalid, and (2) death sentence may constitutionally be imposed under Georgia's aggravating circumstance that defendant's crime was, inter alia, outrageously or wantonly vile, horrible or inhuman in that it involved torture, based on finding that defendant inflicted either psychological or physical torture upon his victim.

Reversed and remanded.

Johnson, Circuit Judge, dissented and filed opinion.

1. Criminal Law ⇐1208.1(5)

Where one of three aggravating circumstances remained valid, fact that other two were reversed did not render entire verdict sentencing defendant to death invalid.

2. Habeas Corpus ⇐391(1)

Failure to object at resentencing hearing did not bar review of issue whether trial court erroneously instructed on aggravating circumstances, because state Supreme Court ruled on its merits, and because state waived procedural default by not raising it.

3. Criminal Law ⇐796

In instructing on aggravating circumstance that jury may impose death penalty if defendant's crime was, inter alia, outrageously or wantonly vile, trial court need not supply additional definitions or limiting instructions. O.C.G.A. § 17-10-30(b)(7).

4. Homicide ⇐340(4)

Although trial judge, in instructing on aggravating circumstance that offense of murder was, inter alia, outrageously or wantonly vile, did not expressly specify that jury could not find that a crime was "outrageously or wantonly vile, horrible or inhuman" without making a specific finding that it demonstrated "torture, depravity of mind, or an aggravated battery to the victim," jury returned verdict that clearly revealed its understanding that the two clauses were interrelated, and therefore trial court did not err in its instruction. O.C.G.A. § 17-10-30(b)(7).

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APPENDIX D

5. Homicide ⇐310(1)

Trial court, in instructing on aggravating circumstance that offense of murder was, inter alia, outrageously or wantonly vile, did not err by failing to instruct that jury could not find "depravity of mind" without finding that defendant had tortured or physically abused victim before his death, because jury's verdict clearly linked "torture and depravity of mind." O.C.G.A. § 17-10-30(b)(7).

6. Criminal Law ⇐1208.1(5)

Death sentence may constitutionally be imposed under Georgia statutory aggravating circumstance, which provides for imposition of death sentence where defendant's crime was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to victim, based on finding that defendant inflicted either psychological or physical torture upon victim. O.C.G.A. § 17-10-30(b)(7).

Appeal from the United States District Court for the Southern District of Georgia.

Before VANCE and JOHNSON, Circuit Judges, and ALLGOOD*, District Judge.

VANCE, Circuit Judge:

The State of Georgia appeals the district court's grant of a petition for a writ of habeas corpus setting aside the death sentence of Christopher Burger.

The facts in the case are set out in the district court's opinion. *Burger v. Zant*, 513 F.Supp. 772, 788-89 (S.D.Ga.1981). Briefly, Christopher Burger and Thomas Stevens, both soldiers at Fort Stewart, Georgia, were indicted for the murder of Roger Honeycutt, also a soldier. On September 4, 1977, Burger and Stevens decided to rob a taxicab driver. The victim, who supplemented his military income by driving a taxi, picked up the two men. Burger and Stevens threatened Honeycutt with knives, forced him to stop the cab and robbed him of sixteen dollars. The victim was placed in the back seat of the cab with Stevens. As Burger drove the vehicle, Stevens forced Honeycutt to disrobe and then to participate in acts of oral and anal sodomy. The victim, nude and bound, was then placed in the trunk of the cab.

With Honeycutt still in the trunk, Burger drove the cab to the local airport, where he and Stevens met a friend and fellow soldier, James Botsford. As they drove back to Fort Stewart, Burger and Stevens explained what they had done, confirming their story by exchanging remarks with Honeycutt in the trunk. After some discussion, Botsford convinced his friends to promise to release Honeycutt unharmed. They dropped Botsford off at the post.

Burger and Stevens then drove to a nearby "borrow pit" which was filled with water. After removing their fingerprints from the cab and removing it radio, Burger raced the trunk and asked Honeycutt if he was all right. Honeycutt responded affirmatively. Burger then closed the trunk, started the car and drove it into the pond, jumping out of it before the car entered the water. The victim died by drowning.

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*Honorable Clarence W. Allgood, U.S. District Judge for the Northern District of Alabama, sitting by designation.

Christopher Burger was convicted of murder and sentenced to death. Stevens was tried separately, convicted, and also sentenced to death. *Stevens v. State*, 242 Ga. 34, 247 S.E.2d 838 (1978). On direct appeal to the Georgia Supreme Court, Burger's conviction was affirmed but his death sentence was vacated and the case remanded for resentencing. *Burger v. State*, 242 Ga. 28, 247 S.E.2d 834 (1978).

On remand, Burger was once again sentenced to death and the sentence was affirmed by the Supreme Court of Georgia. *Burger v. State*, 245 Ga. 458, 265 S.E.2d 796 (1980). The United States Supreme Court denied certiorari. 448 U.S. 913, 101 S.Ct. 31, 65 L.Ed.2d 1175 (1980).

After unsuccessfully exhausting available state post conviction remedies, Burger filed a petition for a writ of habeas corpus in federal district court. The district judge granted the writ insofar as it vacated Burger's death sentence.

The state of Georgia as appellant and Burger as appellee/cross-appellant raise five issues before this court: whether Burger was denied effective assistance of counsel, whether the jury instructions impermissibly shifted the burden of proof onto the defendant, whether *Miranda* violations occurred, whether the district court properly vacated Burger's death sentence where the jury instructions concerning two of the three aggravating circumstances upon which it was based were insufficient and whether the jury instruction on the aggravating circumstance set out in Ga. Code Ann. § 27-2534.1(b)(7) [offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to victim] channeled the discretion of the jury to impose the death sentence.[1] All of these questions were carefully analyzed in District Judge Edenfield's opinion. 513 F.Supp. at 788-803. As to the first three issues, we adopt Judge Edenfield's opinion as our own. The final two issues require discussion.

(1)

The *Stephens* Issue

Christopher Burger's sentencing jury based its death sentence upon three statutory aggravating circumstances: (a) the "offense of murder was committed while the offender was engaged in the commission of another capital felony, kidnapping"; (b) the "offense of murder was committed while the offender was engaged in the commission of another capital felony, armed robbery"; (c) the offense of murder was "outrageously or wantonly vile, horrible or inhuman in that it involved torture and depravity of mind." On direct review, the Georgia Supreme Court held that the trial court had erroneously failed to instruct the jury on the definitions of kidnapping and robbery. The Georgia Supreme Court upheld the death sentence, however, based on the single remaining aggravating circumstance. *Burger v. State*, 265 S.E.2d at 800.

The district court vacated Burger's death sentence, holding that the Supreme Court of Georgia's deletion of the first two aggravating circumstances rendered the entire verdict invalid. The district judge based his decision on our opinion in *Stephens v. Zant*, 631 F.2d 397, modified on

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1. In addition Burger challenges the admission of the confession he gave to the district attorney conducted by the district attorney. The confession was taken [illegible] which he signed the [illegible] with which he furnished the [illegible] Burger

panel rehearing, 646 F.2d 446 (5th Cir. 1981),[2] and Burger and Georgia agree that *Stephens* controls this issue in the present case. Certiorari was granted in the United States Supreme Court in *Zant v. Stephens*, 454 U.S. 814, 102 S.Ct. 90, 70 L.Ed.2d 82 (1981), *question certified to the Georgia Supreme Court*, 456 U.S. 410, 102 S.Ct. 1856, 72 L.Ed.2d 222, *question answered*, 250 Ga. 97, 297 S.E.2d 1 (1982).

[1] On June 22, 1983, the United States Supreme Court decided *Zant v. Stephens*, — U.S. —, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983), reversing the judgment rendered by a panel of the former fifth circuit. The Court held that under the Georgia capital punishment statute the invalidity of one of a plurality of statutory aggravating circumstances does not require that the entire death sentence be vacated. The Court found the death penalty in that case permissible because there were two remaining aggravating circumstances that "adequately differentiate[d that] case in an objective, evenhanded, and substantively rational way from the many Georgia murder cases in which the death penalty may not be imposed." *Id.* at —, 103 S.Ct. at 2741. So long as "at least one of a plurality of aggravating circumstances found by the jury is valid and supported by the evidence," *Zant v. Stephens*, 456 U.S. 410, 414, 102 S.Ct. 1856, 1857, 72 L.Ed.2d 222 (1982), the death sentence may stand. We thus reverse the district court's order compelling resentencing based on our opinion in *Stephens*.

2. In *Spivey v. City of Piedmont*, 662 F.2d 1301 (11th Cir.1981), a panel of the circuit adopted as precedent all former fifth circuit decisions rendered on direct appeal prior to October 1, 1981. In *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir.1981) (en banc), the circuit held that it would have cast decisions of the former fifth circuit also as binding precedent as the aforementioned cut-off

(3)

The *Godfrey* Issue

Burger also challenged the adequacy of the trial court's charge on the sole remaining aggravating circumstance that was applied in his case. Under Ga.Code Ann. § 17-10-30(b)(7), a jury may impose the death penalty if it finds that the defendant's crime was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." Since "[a]lmost, of course, arguable that any murder involves depravity of mind or an aggravated battery," *Gregg v. Georgia*, 428 U.S. 153, 201, 96 S.Ct. 2909, 2938, 49 L.Ed.2d 859 (1976), the potential subjectivity of § (b)(7) has made it the target of numerous constitutional challenges. Although the Supreme Court ruled that § (b)(7) was not unconstitutional on its face in *Gregg*, the Court conceded that the statutory language might be subject to abuse if the Georgia Supreme Court were to adopt "an open-ended construction" of its terms. *Id.* Four years later, the Court re-examined the operation of § (b)(7) in *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), and concluded that the Georgia courts had strayed from the stringent and narrow path marked out in *Gregg*. In *Godfrey*, there was no allegation that the murders committed by the defendant involved either torture or an aggravated battery, and the sentencing jury based its imposition of the death penalty on the complete ground "that the offense of murder was outrageously or wantonly vile, horrible and inhuman." The Georgia Supreme Court upheld the sentence on review, but the Supreme Court reversed. Writing for a plurality of the Court, Justice Stewart held that the jury's findings were an insufficient basis for imposing the death penalty, because "nothing in these few words, standing alone ... implies any inherent restraint on the arbitrary and capricious infliction of the death sentence." *Id.* at 428, 100 S.Ct. at 1765. Although Justice Stewart found that the Georgia Supreme Court in *Godfrey* had ignored its responsibility "to keep § (b)(7) within constitutional boundaries," *id.* at 429, 100 S.Ct. at 1765, he noted that other decisions by that court had placed a limiting construction on the statute that was sufficient to bring § (b)(7) within the ambit of constitutional acceptability:

> The *Harris* [*v. State*, 237 Ga. 718, 229 S.E.2d 1] and *Blake* [*v. State*, 239 Ga. 292, 236 S.E.2d 637] opinions suggest that the Georgia Supreme Court had by 1977 reached three separate but consistent conclusions respecting the § (b)(7) aggravating circumstance. The first was that the evidence that the offense was "outrageously or wantonly vile, horrible or inhuman" had to demonstrate "torture, depravity of mind, or an aggravated battery to the victim." The second was that the phrase, "depravity of mind," comprehends all the [mental state that led the murderer to torture or to commit an aggravated battery before killing his victim. The third, derived from *Blake* alone, was that the word, "torture," must be construed *in pari materia* with "aggravated battery" so as to require evidence of serious physical abuse of the victim before death.

Id. 446 U.S. at 431, 100 S.Ct. at 1766. As long as the Georgia courts observed these precedents, Justice Stewart suggested, death sentences imposed on the basis of § (b)(7) would meet the requirements of *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

[2, 3] In the present case, the trial judge charged the jury that one of the bases for imposing the death penalty was a finding "that the offense of murder was outrageously or wantonly vile, horrible or inhumane [sic] in that it involved torture and depravity of mind." Burger contends that this was insufficient to provide adequate guidance to the jury, and asserts that the trial court was required under *Godfrey* to explain and limit the meaning of § (b)(7) in accordance with the construction of the statutory language and Georgia case law presented by Justice Stewart in the plurality opinion.[3] The district court

3. We agree in principle that Burger did not object to the (b)(7) instruction at the time(s) he should have. He does not bar review of the issue under the decision of *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), however, for either of two reasons. First, we address the issue because the Georgia Supreme Court ruled on it on the merits. *Burger v. State*, 248 Ga. 774, 285 S.E.2d 708 (1982). The court expressly observed that "[c]onsideration of points not [objected to] is necessary to the development of a uniform body of law to the great benefit of both citizens and [the] state," and that "[i]n a case [in which] the death penalty is imposed, [the] court will [not] procedurally default [a] case [on the] basis of [the] failure [to object]." Second, [illegible] *Wainwright* [illegible] *Sykes* [illegible] *Francis v. Henderson*, 425 U.S. 536, 96 S.Ct. 1708, 48 L.Ed.2d 149 (1976). [illegible] *Sykes* [illegible] *Wainwright* [illegible] *Sykes* [illegible] *Engle v. Isaac*, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982). [illegible] *Sykes* [illegible] *Wainwright* [illegible] *Sykes* [illegible] *Jones v. Wainwright*, 604 F.2d 411, 414 (5th Cir.1979), *cert. denied*, 445 U.S. 919, 100 S.Ct. 1282,

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was subjected was anything other than physical." *Id.*, but the situation in the present case is far less clear. In *Burger*, the jury might have viewed the evidence that was presented in a number of different ways. The jury found that Burger had tortured his victim, and the evidence supports a finding beyond a reasonable doubt that Honeycutt was tortured before he died. There was sufficient evidence from which the jury may properly have concluded that Burger aided and abetted his codefendant Stevens in physically torturing Honeycutt, as well as that he personally tortured Honeycutt both physically and psychologically. On the other hand, it is also conceivable that the jury may have found that while Stevens physically tortured Honeycutt, Burger inflicted only psychological torture on him.[6] This case therefore requires us to answer the question which we raised but did not resolve in *Stanley*: whether there is any significant distinction between mental or psychological and physical torture under either the law of Georgia or the Constitution. If the latter is within constitutional limits but the former is not, *Sandstrom* requires that the jury must receive instructions to this effect.

The deliberate infliction of mental anguish certainly comes within the commonly understood meaning of the word "torture,"[7] and the sole support which Burger offers for his argument that the court should hold differently is the language of Justice Stewart's plurality opinion in *Godfrey*. As an initial matter, it is important to emphasize that the *Godfrey* plurality's reversal of the death sentences imposed in his case ultimately stemmed not from its dissatisfaction with the jury instructions, but from its belief that the Georgia Supreme Court had failed to carry out its place in the statutory scheme given conditional approval in *Gregg*.

> In past cases the State Supreme Court has apparently understood this obligation of carrying with it the responsibility to keep it [its] (p87) within constitutional bounds. . . . Thus, the validity of the petitioner's death sentences turns on whether, in light of the facts and circumstances of the murders that he was convicted of committing, the Georgia Supreme Court can be said to have applied a constitutional construction of the [statute].

446 U.S. at 429, 432, 100 S.Ct. at 1765, 1767. Thus, the key inquiry in the mind of the *Godfrey* plurality was whether the Georgia Supreme Court had kept faith with its own expressed standards in reviewing the defendant's sentences of death. Justice Stewart found that it had not done so in *Godfrey*, basing this view on his construction of the Georgia statute and case law. He noted, however, that his research was limited to cases pre-dating 1978, and he conceded that the third of the "separate but consistent conclusions" which he deduced from the Georgia case law—the requirement that torture be construed *in pari materia* with "aggravated battery"—was derived from a single decision, *Blake v. State*, 239 Ga. 292, 236 S.E.2d 637 (1977). The basis for Justice Stewart's conclusion was apparently the Georgia Supreme Court's statement that it "[c]onsider[ed] torture and aggravated battery on the one hand *as substantially similar treatment* of the victim and depravity of mind on the other hand as relating to the defendant . . ." 236 S.E.2d 643 (emphasis added).

Although Justice Stewart's construction of the Georgia law on this point was strongly criticized at the time, *see, e.g., Godfrey*, 446 U.S. at 435-36, 100 S.Ct. at 1768-69 (Marshall, J., concurring in the judgment); 446 U.S. at 443, 100 S.Ct. at 1772-73 (Burger, C.J., dissenting); Donahue, *Godfrey v. Georgia: Creative Federalism, the Eighth Amendment, and the Evolving Law of Death*, 30 Cath.U.L.Rev. 13, 41-47 (1980), the Georgia Supreme Court subsequently affirmed its adherence to his construction in *Hance v. State*, 245 Ga. 856, 268 S.E.2d 329 (1980), where the court noted that "[t]orture occurs when the victim is subjected to serious physical abuse before death." 268 S.E.2d at 334. The *Hance* court went on, however, to endorse an expansive definition of the term "serious physical abuse":

> *Serious* sexual abuse may be found to constitute serious physical abuse. [Citation omitted.] "Torture also occurs when the victim is subjected to an aggravated battery as hereinabove defined. Evidence of psychological abuse by the defendant to the victim before death where it is shown to have resulted in severe mental anguish to the victim in anticipation of physical harm may amount to serious physical abuse (i.e., torture of the victim), and also will support a finding of depravity of mind of the defendant.

Id. Subsequent decisions by Georgia's highest court have reaffirmed its interpretation of "physical abuse" as including both sexual and psychological abuse as well. *See, e.g., Phillips v. State*, 250 Ga. 336, 297 S.E.2d 217, 221 (1982); *Brown v. State*, 247 Ga. 298, 275 S.E.2d 52, 58 (1981).

Since the Georgia law therefore follows common usage in finding that the deliberate infliction of mental anguish constitutes "torture," we conclude that the trial court's failure to elaborate or define the term further does not run afoul of the rule in *Sandstrom*. In meaningful contrast to the more amorphous term "depravity of mind," "torture" has a readily understandable and generally understood meaning. This excludes a reasonable risk that the jury might give it an unintended interpretation.

We are no more persuaded that the definition of "torture" applied by the Georgia courts violates substantive federal constitutional guarantees. The central theme of the Supreme Court's death penalty jurisprudence has always been that the states must draft and apply their capital punishment laws in a manner that "genuinely narrow[s] the class of persons eligible for the death penalty." *Zant v. Stephens*, — U.S. at —, 103 S.Ct. at 2742-43, thereby precluding a "principled basis for distinguishing [a] case, in which the death penal-

6. The district court's correct analysis of the evidence is as follows:

> Of course, the present case involves many circumstances which may readily be seen as involving "torture" and collective "depravity of mind." There was ample evidence upon which the jury might have found petitioner aided and abetted in Stevens' subjecting the victim prior to his death. Serious sexual abuse has been equated with "torture" under Georgia law. *Hance v. State*, 245 Ga. 856, 268 S.E.2d 329 (1980). Similarly, serious physical abuse can readily be seen in the confining of the victim in the car trunk for a period of hours, bound, nude and certainly anxious as the victim was by capital punishment. Likewise, there can be little question but that petitioner's actions upon Pamela Honeycutt's condition prior to subsequent to the last self-admonished "depravity of mind" and further, that the victim's torture as the trunk murder fully amounted to "torture." 513 F.Supp. 708-09.

7. In pertinent part, the definition of torture provided by Webster's New Collegiate Dictionary is as follows:

> 1 : the infliction of severe pain (as by beating, pinching, or wrenching) to punish, coerce, or afford sadistic pleasure 2a : mental or bodily suffering : anguish

ty [is] imposed, from the many in which it [is] not." *Godfrey*, 446 U.S. at 433, 100 S.Ct. at 1767. The Georgia Supreme Court has recently demonstrated that it will not allow the category of psychological abuse to become all-inclusive.[5] In *Phillips v. State*, *supra*, the court emphasized that a finding of "serious psychological abuse" required a showing that "the defendant inflicted deliberate, offensive and prolonged pain on his victim prior to death." 297 S.E.2d at 221. Thus, "the mere apprehension of death, immediately before the fatal wounds are inflicted" was found insufficient to justify a finding of "torture" under § 0(b)(7). *Id.*

[4] We therefore decide that a death sentence may constitutionally be imposed under § (b)(7) based on a finding that the defendant inflicted either psychological or physical torture upon his victim. We can discern no principled basis for attempting to distinguish the two, and it seems highly questionable that Justice Stewart meant to draw such a distinction in *Godfrey*. The standards applied by the Georgia courts certainly restrict the class of persons eligible for the death penalty by reason of the "torture" provision of § (b)(7), and the facts of this case easily place it within the core of those the statute was designed to reach. Burger's contentions must therefore be rejected.

Having concluded that both phases of Burger's trial are free of constitutional error, we reverse the judgment of the district court and remand with instructions that the writ be denied.

REVERSED and REMANDED.

JOHNSON, Circuit Judge, dissenting:

I concur in the majority's opinion except that, for the following reasons, I dissent from that part of the opinion adopting the district court's opinion and order, 513 F.Supp. at 795-98, denying Burger's petition for habeas corpus relief on the grounds that he was denied the right to effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments at both of his state court trials and on appeal to the Supreme Court of Georgia. A review of the record reveals that Burger was denied the effective assistance of counsel both by his appointed counsel's active representation of his co-defendant's conflicting interest and by his counsel's failure to present any evidence in mitigation at either of his two sentencing proceedings.

A review of the general principles applicable to all ineffective assistance of counsel claims is in order. The Sixth Amendment guarantees a criminal defendant the right to "*effective* assistance of counsel, that is, counsel reasonably likely to render and rendering effective assistance." *Washington v. Strickland*, 693 F.2d 1243, 1250 (5th Cir. Unit B 1982) (en b. set), *cert. granted*, ___ U.S. ___, 103 S.Ct. 2451, 77 L.Ed.2d 1332 (1983). The appropriate methodology for determining whether there has been effective assistance of counsel is to examine the totality of circumstances in the record. *Batty v. Balkcom*, 661 F.2d 391, 394 (5th Cir. Unit B 1981). Although neither an expert nor a non-expert case is defendant entitled to error-free counsel, the "number, nature and seriousness of the charges

5. Here, of course, as in *Zant v. Stephens*, our decision "is not based on the existence of an important procedural safeguard, the mandatory appellate review of a death sentence by the Georgia Supreme Court to avoid arbitrariness and to assure proportionality." ___ U.S. at ___, 103 S.Ct. at 2747.

against the defendant are all part of the 'totality of the circumstances in the entire record' that must be considered in the effective assistance calculus." *Washington v. Watkins*, 655 F.2d 1346, 1357 (5th Cir. 1981).

Turning first to Burger's conflict of interest claim, in order to establish the constitutional predicate for ineffective assistance Burger must show that his counsel actively represented actually conflicting interests. *Cuyler v. Sullivan*, 446 U.S. 335, 349-50, 100 S.Ct. 1708, 1718-19, 64 L.Ed.2d 333 (1980); *Westbrook v. Zant*, 704 F.2d 1487, 1489 (11th Cir.1983). Applying this standard to the facts of this case, the record is clear that Burger's counsel was actively representing both Burger and his co-indictee Stevens and that an actual conflict of interest between the two violated Burger's right to the effective assistance of counsel.[1]

First, it is apparent that Burger's counsel actively represented both Burger and Stevens. Both Burger and Stevens were charged with and indicted for the murder of Roger Honeycutt. Both Burger and Stevens were appointed counsel by the trial court at approximately the same time, and within a few weeks after they had been charged with the crime. Burger's appointed counsel, Leaphart, and Stevens' appointed counsel, Smith, were partners in a two-partner law firm. At the federal habeas hearing, Leaphart testified that he interviewed both Burger and Stevens. Leaphart testified that he assisted Smith in the preparation of Stevens' case and that Smith assisted him in the preparation of Burger's case. Leaphart and Smith discussed the issues involved in each case and researched the law together. Smith sat at counsel table and assisted Leaphart during Burger's trial. Although not physically present at Stevens' trial, Leaphart testified that he worked then with—discussed the matter with Bob [Smith]. We researched the law together."[2] Smith and Leaphart collaborated in preparing the briefs for both Burger and Stevens on each defendant's first appeal to the Supreme Court of Georgia; Leaphart testified that he "primarily" prepared the briefs for Burger and Stevens on the second appeal to the Supreme Court of Georgia.[3] The fee received by each attorney for representing each client was deposited in the law firm's corporate account. At no time in his representation of Burger did Leaphart or the trial court ever inform Burger of a possible conflict of interest.

Whether analyzed as a situation where one attorney, Leaphart, represented both Burger and Stevens,[4] or where one attorney, Leaphart, represented Burger and another attorney, Smith, represented Stevens, the situation is comparable to the facts as reflected in the record. Leaphart and Smith were partners in the practice of law, the attorneys had worked closely in the defense of the other's client and seem to have served their roles as a defense team acting on behalf of [illegible] of the accused. *United States ex rel. Sullivan v. Cuyler*, 581 F.2d 1175, 1179 (3d Cir.1978), *aff'd on other grounds*, *Cuyler v. Sullivan*, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). Leaphart conducted conferences with Stevens, aided in preparing his case for trial, and prepared the briefs for both his [illegible]. Whether this be the result of each

1. The Sixth Amendment guarantee of effective assistance of counsel necessarily includes the guarantee of conflict-free counsel. *Holloway v. United States*, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978); *United States v. Alvarez*, 580 F.2d 1251, 1254 (5th Cir.1978).

2. Transcript of Federal Habeas Corpus Hearing (THC) at 49.

3. HH at 50-51.

4. The record may well indicate that the conflict of interest was imposed by Burger's attorneys, in requiring the representation of multiple defendants by one attorney. Once Burger's counsel, Leaphart, and Stevens' appointed counsel, Smith, were partners in a two-partner law firm. At the federal habeas hearing, Leaphart testified that he interviewed both Burger and Stevens. Leaphart testified that he assisted Smith in the preparation of Stevens' case and that Smith assisted him in the preparation of Burger's case. Leaphart and Smith discussed the issues involved in each case and researched the law together. Smith sat at counsel table and assisted Leaphart during Burger's trial. Although not physically present at Stevens' trial, Leaphart testified that he worked then with—discussed the matter with Bob [Smith]. We researched the law together."[2] Smith and Leaphart collaborated in preparing the briefs for both Burger and Stevens on each defendant's first appeal to the Supreme Court of Georgia; Leaphart testified that he "primarily" prepared the briefs for Burger and Stevens on the second appeal to the Supreme Court of Georgia.[3] The fee received by each attorney for representing each client was deposited in the law firm's corporate account. At no time in his representation of Burger did Leaphart or the trial court ever inform Burger of a possible conflict of interest.

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firm represented both Burger and Stevens,[5] the end result on these facts is the same: Leaphart was actively involved in the defense of both to the extent that a conflict of interest was clearly established.

Although multiple representation is the paradigm context in which conflict of interest claims arise,[6] a finding of multiple representation alone does not establish ineffective assistance of counsel. *Foxworth v. Wainwright*, 516 F.2d 1072 (5th Cir.1975). The conflict must be shown to be actual, not speculative, before it will cause representation to fail Sixth Amendment standards. *Baty v. Balkcom*, 661 F.2d at 397. "An actual conflict of interest occurs when a defense attorney places himself in a situation inherently conducive to divided loyalties." *Zant v. Alabama*, 568 F.2d 436, 439 (5th Cir.1978) (*quoting Castillo v. Estelle*, 504 F.2d 1245, 1245 (5th Cir.1974)); *see also Baty v. Balkcom*, 661 F.2d at 397 ("[a]n actual conflict of interest exists if counsel's introduction of probative evidence or plausible arguments that would significantly benefit one defendant would damage the defense of another defendant whom the same counsel is representing.").

In this case, the fundamental issue, as perceived by counsel, was not that of guilt, but of culpability. Upon the habeas corpus hearing Leaphart testified at length concerning the evidence supporting Burger's lesser degree of culpability for the murder as compared to Stevens'.[7] Summarized, the evidence was that at the time the crime was committed Burger was seventeen; Stevens was twenty. Burger has an I.Q. of 92 and possible brain damage. Stevens appeared to be the leader in their relationship; Burger the follower. Stevens planned and initiated the robbery of the victim; Burger followed his instructions. Stevens actually committed the robbery; Stevens made the victim undress; Stevens forced the victim to perform oral sodomy on Stevens; Stevens anally sodomized the victim; Stevens tied the victim up and forced him to get in the trunk of the cab. Stevens told Burger they would have to kill him; Burger said he didn't want to kill him. Stevens told Burger they would have to get rid of the cab by driving it into the pond; Stevens ordered Burger to drive the cab with the victim locked in the trunk into the pond. Burger drove the cab and the victim into the pond. In short, the essence of Burger's defense was that he was less culpable than Stevens.

In such a situation, any evidence or arguments made by counsel in Burger's behalf would, by the very nature of Burger's defense, damage Stevens. An actual conflict of interest between Burger and Stevens is thus apparent. Stated differently, Burger's interests were drastically adverse to those of Stevens.

> If a defense attorney owes duties to a party whose interests are adverse to those of the defendant, then an actual conflict of interest exists. The interests of the other client and the defendant are sufficiently adverse if it is shown that the attorney owes a duty to the defendant to take some action that could be detrimental to his other client.

Zant v. Alabama, 568 F.2d at 439.

The course of Burger's state court proceedings illuminates the duty owed him by Leaphart to take actions that could be detrimental to Stevens. First, Leaphart did not at any time in his representation of Burger offer Burger's testimony against Stevens in exchange for a sentence less than the death penalty for Burger.[8] *See Baty v. Balkcom*, 661 F.2d at 397 n. 12 ("[p]lea bargains are perhaps the most obvious example of the manifest effects of a conflict of interest at pretrial proceedings."); *see also Fleming v. State*, 246 Ga. 30, 270 S.E.2d 185, 189 (1980) (Hawkes, concurring) ("[n]o two defendants share equal responsibility for a crime. Usually one is more culpable than the other or for any number of reasons has a greater degree of responsibility for what occurred. One may also be more entitled to leniency based on such factors as age, intelligence, motive, background, previous conduct or record, etc. Common counsel eliminates any practical possibility of plea bargaining."). Second, at Burger's trial Stevens was not called as a witness by the defense. If Stevens had been called by the state, Leaphart would have been placed in the untenable position of cross-examining his own client. Finally, Leaphart prepared the briefs for both Burger and Stevens on co-defendant's second appeal to the Supreme Court of Georgia. In Burger's brief, Leaphart does not argue that he was the less

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5. "The same principles [governing Sixth Amendment conflict of interest claims] apply where the joint representation is by two members of the same firm." *Ross v. Heyne*, 638 F.2d 979, 983 (7th Cir.1980) (*quoting United States v. Hoffman*, 471 F.Supp. 895, 899 n. 4 (S.D.N.Y.1979)); *see also United States v. Rosahn*, 504 F.2d 1039, 1047 (2d Cir.1974) ("[t]he same rule applies with equal force to representation of two or more defendants by members of the same law firm."). *Cf. Zack v. Alabama*, 583 F.2d 436, 438 (5th Cir.1978) (ineffective assistance found where "[t]he law firm which served as counsel to Zack in his murder trial also represented, on an unrelated civil matter, the state prosecutor who tried Zack."). Fed.R.Crim.Pro. 44(c) ("Whenever two or more defendants have been jointly charged . . . and are represented by retained or appointed counsel who are associated in the practice of law, the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of his right to the effective assistance of counsel, including separate representation."), construed in *Ross v. Heyne*, 638 F.2d at 983 ("[t]he Supreme Court's proposal of this rule indicates an recognition that the potential constitutional problems attendant to multiple representation are present when different attorneys from the same legal partnership represent codefendants with conflicting interests."); ABA Code of Professional Responsibility DR 5-105(D). Further, the Supreme Court of Georgia, exercising its supervisory rule over the bar, has adopted a mandatory rule to death penalty cases that codefendants must be provided with separate and independent counsel. *Fleming v. State*, 264 Ga. 230, 443 S.E.2d 193 (1994). This rule applies with equal force to representation by a firm's attorneys or by members of the same law firm. *Id.* at 193 n. 7.

6. *See Cuyler v. Sullivan*, 446 U.S. at 350, 100 S.Ct. at 1717 ("[a] possible conflict of interest in . . . cases [other] instances of multiple representation"); *United States v. Rhodes*, 779 F.2d 1571, 1574 (11th Cir.1986).

7. [illegible]

8. At the federal habeas hearing, Leaphart testified that he had not, at any time during his representation of Burger, discussed with the district attorney the possibility of Burger's testifying against Stevens in return for a lesser sentence. THE at 33-35. When further questioned about plea negotiations on Burger's case, Leaphart testified that "it had crossed my mind . . . but that during the [trial] the district attorney refused to discuss it to any level." THE at 37 (emphasis supplied). From this testimony it appears that plea negotiations were [illegible]

culpable party, although the scope of the Supreme Court of Georgia's appellate review in capital cases includes a consideration of whether the "sentence of death is excessive or disproportionate to the penalty in similar cases, considering both the crime and the defendant." O.C.G.A. § 17-10-35(c)(3) (1982), formerly Ga.Code Ann. § 27-2537(c)(3) (1933).

Once an actual conflict of interest is shown, without further inquiry, prejudice to the defendant is presumed. *Westbrook v. Zant*, 704 F.2d 1487, 1499 (11th Cir. 1983). "It is well established that when counsel is confronted with an actual conflict of interest, prejudice must be presumed, and except under the most extraordinary circumstances, the error cannot be considered harmless." *Baty v. Balkcom*, 661 F.2d at 395 (*quoting Turnquest v. Wainwright*, 651 F.2d 331, 334 (5th Cir. 1981)). The rationale for dispensing with the requirement of a showing of prejudice in conflict of interest cases "becomes apparent when one considers the nigh impossible task of making a meaningful qualitative analysis of trial counsel performance, in a case marking divided loyalties, from an examination of the transcript alone." *Johnson v. Hopper*, 639 F.2d 256, 259 (5th Cir. Unit B 1981). The degree to which counsel's strategic decisions and performance throughout the course of his representation are affected by an actual conflict of interest subtly permeate the whole of the defense and may not be manifested in his conduct at trial alone. "[T]he sixth amendment requires that a defendant may not be represented by counsel who might be inclined to direct the order of his defense in order to placate his other client. The fact that a particular lawyer may actually resist the temptation is of no concern." *Zant v. Blackmon*, 705 F.2d at 1467.

In light of this precedent it is clear that the presumption of prejudice arising from an actual conflict of interest cannot be overcome by evidence that counsel did, in fact, vigorously pursue one client's defense to the detriment of the other at trial. Although the factual content of the extraordinary circumstances in which the error of representing actually conflicting interests is considered harmless has not been delineated by this Court, it is apparent that a showing of no adverse effect upon counsel's performance at trial or no impairment of his client's defense does not constitute such a circumstance.

Thus, accepting the district court's findings, those findings having been adopted by the majority in this case, that Leuhart "in no way tailored his strategy toward protecting Stevens" at Burger's trial, and that the trial record "shows considerable effort to gain mercy for petitioner by portraying Stevens as the chief architect of the crime," the presumption of prejudice from the actual conflict of interest between Burger and Stevens remains. Further, the actual conflict of interest between Stevens and Burger was not limited to Burger's trial, but permeated the entire course of Burger's state court proceedings. Once Burger established that an actual conflict of interest was present, whether at pretrial plea negotiations, trial or on appeal, and that he counsel actively represented both subjects, his claim of ineffective assistance of counsel was complete.

I turn now to Burger's claim that he was denied the effective assistance of counsel because he counsel failed to present any evidence in mitigation or otherwise, at either of his two sentencing proceedings. In *Blake v. Zant*, 695 F.2d 363, 367 (11th Cir. 1983), the court rejected a claim of failure to present any mitigating evidence at the sentencing proceeding in addition to that presented at the guilt phase of the trial constituted per se ineffective assistance of counsel. Although, unlike Stanley's attorney, Burger's attorney did not present any evidence during either the guilt or two sentencing phases, it is not necessary to articulate a per se rule of ineffectiveness in this case as "application of general principles governing effectiveness of counsel to the specific context of a capital sentencing proceeding," *id.*, demonstrates the ineffectiveness of Burger's counsel.

Counsel's duty of effective representation continues into the sentencing phase of his client's trial. *King v. Strickland*, 714 F.2d 1481, at 1491 (11th Cir.1983).

> The sentencing phase of any case regardless of the potential punishment, is the time at which for many defendants the most important services of the entire proceedings can be performed." ABA Standard on Criminal Justice, Sentencing Alternatives and Procedures § 5.2(c). The special importance of the capital sentencing proceeding gives rise to a duty on the part of defense counsel to be prepared for that crucial phase of the trial. *Stanley v. Zant*, 697 F.2d at 963.

"At the heart of the duty of effective representation is the independent duty to investigate and prepare." *Goodwin v. Balkcom*, 684 F.2d 794, 805 (11th Cir.1982). In *Washington v. Strickland*, 693 F.2d 1243 (5th Cir. Unit B 1982) (en banc court), delineated the content of the duty to investigate:

> A lawyer cannot without the benefit of a reasonable substantial investigation into [a] plausible line of defense, even one based upon counsel's professional assumption regarding the prospects for success offered by the various lines. The cases generally conform to a workable and sensible rule: when counsel's assumptions are reasonable given the totality of the circumstances and when counsel's strategy represents a reasonable choice based upon those assumptions counsel need not investigate lines of defense that he has chosen not to employ at trial.
>
> . . . . . .
>
> In sum, an attorney who makes a strategic choice to channel his investigation into fewer than all plausible lines of defense is effective so long as the assumptions upon which he bases his strategy are reasonable and his choices on the basis of those assumptions are reasonable. *Id.* at 1255, 1256 (footnotes omitted).

"An attorney may proceed absent a reasonable investigation into all potential lines of defense, but he does so at his peril." *Stanley v. Zant*, 697 F.2d at 966. Finally, once a showing of ineffective assistance of counsel due to counsel's failure to investigate has been made, the second prong of *Washington v. Strickland* requires that prejudice from the error be demonstrated. *Id.* at 1256.

The district court found that Leuhart's investigation into available mitigating evidence consisted solely of conversations with Burger's mother. Although it is unclear what the content of these conversations was relating to mitigating evidence concerning Burger's background outside of Wilcox County, Georgia, and the identity of possible character witnesses, who could be, the district court concluded that Leuhart's efforts "adequate if hardly ideal investigation," and that he "investigated options to

meet at least minimal professional standards." Clearly by no stretch of the imagination could Leaphart's investigation be characterized as reasonably substantial. Since Leaphart failed to conduct a reasonably substantial investigation into available mitigating evidence, in order to be effective his choice not to investigate must have been a reasonable strategic decision based upon reasonable assumptions. Three reasonable assumptions on which Leaphart's strategy not to substantially investigate available mitigating evidence have been proffered: 1) that Leaphart's theory of defense, or strategy, was to make the state prove its case, 2) that, if mitigating evidence had been offered at Burger's sentencing proceedings, Leaphart would have lost the right to opening and closing argument, and 3) that Leaphart chose to rely in closing on the argument that Burger had never been in trouble before, an argument which would have been undercut by an investigation into Burger's background. None of these strategies, and the assumptions on which they are based, withstand scrutiny for reasonableness.

Leaphart testified concerning his strategy or theory of defense in Burger's case:

> Well, of course, my theory of defense was of course trying to make the District Attorney prove his case. And my theory of defense was to—well, that in effect, in essence what it was. And use whatever rules of evidence and to prevent him from doing so.[9]

And, anecdotally concerning the second trial solely on the issue of penalty, Leaphart again testified that he "[f]elt that case should have been tried on the facts and make the District Attorney—I can make him, use whatever rules of evidence to exclude those harmful facts."[10] The law provides that the state must prove its case, whether defense counsel is present or not. Relying on the state's case is not a "strategy" for the defense, but instead reflects an abandonment of counsel's obligation to develop a case for his client. This proffered strategy is tantamount to no strategy at all, and reliance on such a strategy, especially in the context of a capital sentencing proceeding, as an alternative to substantially investigating available mitigating evidence is patently unreasonable.

Second, Leaphart testified that he made a decision not to offer any evidence in mitigation in order to preserve his right to opening and closing arguments. Again, the basic assumption on which this strategy was based is patently unreasonable. O.C.G.A. § 17-10-2(a) & (c) (1982), formerly Ga.Code Ann. § 27-2502(a) & (c) (1953), provide for the conduct of sentencing proceedings in capital cases: "The district attorney shall open and the defendant or his counsel shall conclude the argument." The presentation of evidence by the defendant at a capital sentencing proceeding in no way affects the division of argument between the state and the defense. In fact, this procedure was followed at Burger's sentencing proceedings: the district attorney opened and defense closed final arguments to the jury. Leaphart simply failed to inform himself of his Georgia criminal procedure in sentencing proceedings. *Cf. Young v. Zant*, 677 F.2d 792 (11th Cir. 1982). Such strategy based on such a false assumption is unreasonable. The district court clearly erred in concluding otherwise.

[9] [illegible]

[10] [illegible]

The district court found that Leaphart's failure to substantially investigate available mitigating evidence was based on a strategic choice to rely in closing argument on the "major argument" in Burger's behalf that he had no prior record of violent crime and had never been in trouble before. As it relates to Burger's second sentencing proceeding, this finding is contradicted by the record: at no point in his closing argument did Leaphart mention the lack of evidence that Burger had a record or had been in trouble before. Instead, Leaphart's closing argument at the second sentencing proceeding argued Burger's lack of culpability as compared to Stevens', and concluded with the plea for mercy. Neither argument would have been undercut by the presentation of humanizing evidence concerning Burger's background.

In conclusion, Leaphart's decision not to substantially investigate available mitigating evidence was not a reasonable strategic choice, and thus his failure to investigate constituted ineffective assistance of counsel.

The inquiry does not end with a finding of ineffective assistance. Burger may prevail only if he shows both a denial of effective assistance and actual prejudice to the course of his defense. *Washington v. Strickland*, 693 F.2d at 1258. Under any standard, in the case presented to appointed *See Douglas v. Wainwright*, 714 F.2d 1532 at 1536–38 (11th Cir.1983).

At the federal habeas hearing, Burger offered the testimony of his mother and numerous affidavits concerning his troubled childhood and background. Testimony revealed the evidence was that Burger's parents had been married when his mother was fourteen and his father was sixteen. Both parents divorced when he was a child. Neither parent wanted Burger and his childhood was spent shuffled between the two. His father threw him out of the house, his mother sent him back to live with his father. Burger's mother remarried. Burger's stepfather beat Burger, and beat Burger's mother in his presence. Burger's stepfather involved him in drugs and alcohol when he was eleven years old. Burger's mother and stepfather moved from Indiana to Florida. Burger was sent to live with his father. Burger's father beat him and refused to have anything to do with him. Burger ran away and hiked to Florida to live with his mother, selling his shoes to buy food along the way. When Burger arrived barefoot in Florida his stepfather told him he could not stay with them. Burger's mother told the juvenile authorities that she didn't want him, and to send him back to his father in Indiana. When Burger arrived in Indiana, his father locked him out of the house. Burger was taken in by a neighbor, as he had nowhere else to go. The clinical psychologist who examined Burger testified at a motion hearing that Burger had an I.Q. of 82 and possible brain damage.

It is absolutely astounding to me that none of the evidence was ever presented to Burger's jury. The district court found that although the affidavits of the character witnesses supplied by Burger at the hearing do "contain references to a difficult childhood which might have created some sympathy for Mr. Burger," they also contained references to drug abuse, juvenile probation and violence. However, the thrust of the character testimony offered by Burger was not what Leaphart received without investigation: that Burger was a good boy and went to church, but that Burger's personality and motivation could be explained by his history and setting

childhood. Although this is precisely the kind of humanizing evidence that "may make a critical difference, especially in a capital case," Leaphart failed to make a substantial investigation into its use. *Stanley v. Zant*, 697 F.2d at 969. Leaphart testified that "[I] did not have any knowledge of any witnesses that—potential witnesses that I thought would have benefited him. Had I known or had knowledge of any, I would—certainly would have used them." [11] The prejudice to Burger from counsel's failure to substantially investigate available mitigating evidence and present it at either of his capital sentencing proceedings lies in the alternative chosen by counsel: to present no evidence at all. On the basis of the state court record, two sentencing juries recommended the death penalty.

Failure to present this substantial, available mitigating evidence meets the prejudice prong of *Washington v. Strickland*, 693 F.2d at 1263-62, showing that "the petitioner suffered actual and substantial detriment to the conduct of his defence."

For these reasons, I would REVERSE the district court's finding that Burger was afforded the effective assistance of counsel during his state court proceedings and REMAND this case to the state court for a trial with Burger being represented by conflict-free and competent counsel.

11. THC at 44.

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

No. 86-5375

RECEIVED
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CHRISTOPHER A. BURGER,

Petitioner,

v.

RALPH KEMP, WARDEN,
GEORGIA DIAGNOSTIC AND
CLASSIFICATION CENTER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR THE RESPONDENT

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QUESTIONS PRESENTED

1.

Whether, after reconsideration in light of Francis v. Franklin, 471 U.S. ___, 105 S.Ct. 1965 (1985) pursuant to this Court's remand in Burger v. Kemp, ___U.S.___, 106 S.Ct. 41 (1985), this Court should grant a writ of certiorari to review the circuit court's finding that the trial court's alleged burden-shifting charge on intent was harmless beyond a reasonable doubt?

2.

Whether this Court should grant a writ of certiorari to review Petitioner's contention that he was rendered the ineffective assistance of counsel, which contention has been found to be totally without merit by every state and federal habeas corpus court and upon which issue this Court granted certiorari and remanded at Burger v. Zant, ___U.S.___, 104 S.Ct. 1652 (1984), but subsequently did not grant certiorari at Burger v. Zant, ___U.S.___, 106 S.Ct. 41 (1985), after the circuit court again affirmed the denial of relief?

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

No. 86-5375

CHRISTOPHER A. BURGER,

Petitioner,

v.

RALPH KEMP, WARDEN,
GEORGIA DIAGNOSTIC AND
CLASSIFICATION CENTER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR THE RESPONDENT

PART ONE

STATEMENT OF THE CASE

The Petitioner was convicted of murder in the Superior Court of Wayne County, Georgia on January 25, 1978. A sentence of death was imposed. On direct appeal to the Supreme Court of Georgia the Petitioner's conviction was affirmed; however, the Petitioner's sentence of death was vacated and a new trial was ordered as to punishment in Burger v. State, 242 Ga. 28, 247 S.E.2d 834 (1978).

The Petitioner was subsequently retried on the issue of punishment and on July 19, 1979 the Petitioner was again sentenced to death. On direct appeal from the reimposition of the death penalty the Supreme Court of Georgia affirmed the Petitioner's sentence in Burger v. State, 245 Ga. 458, 265 S.E.2d 796, cert. denied, 448 U.S. 913 (1980).

State habeas corpus relief was denied on October 1, 1980 by the state habeas corpus court, which denial of relief was affirmed by the Supreme Court of Georgia on that same date. From the denial of habeas corpus relief in the state courts, on October 2, 1980 the Petitioner filed an application for habeas corpus relief in the United States District Court for the Southern District of Georgia, Brunswick Division.

After conducting an extensive evidentiary hearing on March 4, 1981 the district court, on April 29, 1981 rendered its Order and Judgment granting the Petitioner habeas corpus relief in the form of an Order vacating Petitioner's sentence of death. The district court afforded habeas corpus relief in this regard based solely upon the circuit court's decision in Stephens v. Zant, 631 F.2d 397, modified on panel rehearing, 648 F.2d 446 (5th Cir. 1981).[1] The district coert denied Petitioner's request for habeas corpus relief on all other allegations contained in his petition.

On May 11, 1981 the Respondent filed his notice of appeal from the district court's grant of habeas corpus relief. Petitioner filed a timely cross-appeal from that portion of the district court's Order denying habeas corpus relief on all other allegations contained in the petition.

---

[1]On Argument before the United States Court of Appeals for the Eleventh Circuit, counsel for the parties agreed that this Court's then pending decision in Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983) would control dispostion of the sole basis upon which habeas corpus relief was afforded by the district court. As is revealed by an examination of the circuit court's opinion below at Burger v. Zant, 718 F.2d 979, 982 (11th Cir. 1983), in light of this Court's opinion in Zant v. Stephens, supra, the district court's grant of habeas corpus relief was reversed.

On October 13, 1983, after extensive briefing and oral argument, the United States Court of Appeals for the Eleventh Circuit rendered its opinion reversing the district court's grant of habeas corpus relief. Burger v. Zant, 718 F.2d 979 (11th Cir. 1983).

On February 13, 1984, Petitioner's petition for rehearing and suggestion for rehearing en banc were denied. On February 27, 1984 the circuit court denied Petitioner's request to stay the mandate pending filing of an application for a writ of certiorari in this Court. On March 6, 1984, upon receipt of the mandate of the circuit court, the district court entered its Order making the judgment of the United States Court of Appeals for the Eleventh Circuit the judgment of the district court.

On May 29, 1984, this Court granted certiorari and remanded the instant case to the circuit court for reconsideration in light of Strickland v. Washington, ___U.S.___, 104 S.Ct. 2052 (1984). Burger v. Zant, ___U.S.___, 104 S.Ct. 2652 (1984).

The circuit court remanded this matter to the district court for reconsideration as required by this Court's order. Burger v. Zant, 741 F.2d 1274 (11th Cir. 1984). After reexamination of the effective assistance of counsel issue in light of Strickland v. Washington, supra, the district court again found no constitutional error.

On February 5, 1985 the circuit court affirmed the district court's finding that Burger was in fact rendered the effective assistance of counsel. Burger v. Kemp, 753 F.2d 930 (1985). Burger's petition for rehearing en banc was denied on March 25, 1985.

Petitioner next petitioned this Court for a writ of certiorari upon claims of ineffective assistance of counsel and the existence of an alleged burden-shifting charge given by the trial court on the issue of intent. This Court, in Burger v. Kemp, ___U.S.___, 106 S.Ct. 41 (1985), granted certiorari and

remand for reconsideration in light of Francis v. Franklin, 471 U.S. ___, 105 S.Ct. 1965 (1985) on the burden-shifting charge issue only.

After reconsideration pursuant to this Court's remand, the circuit court found the trial court's charge on intent to constitute harmless error beyond a reasonable doubt. Burger v. Kemp, 785 F.2d 890 (11th Cir. 1986). On July 23, 1986, Petitioner's petition for rehearing and suggestion for rehearing en banc was denied.

This instant application by Burger for the writ of certiorari has been prompted by the circuit court's affirmation of the district court's denial of habeas corpus relief.

STATEMENT OF FACTS

As noted by the Supreme Court of Georgia on the appeal taken by the Petitioner following his retrial on sentencing and the reimposition of a sentence of death, "[t]he facts surrounding the death of the victim, Roger Honeycutt, are amply set out in Burger v. State, supra [242 Ga. 28, 247 S.E.2d 834] and its companion case, Stevens v. State, 242 Ga. 34 (247 S.E.2d 838)(1978) and will not be repeated here." Burger v. State, 245 Ga. 458, 265 S.E.2d 796, cert. denied, 448 U.S. 913 (1980). Because the facts underlying Petitioner's reimposed sentence of death are the same as those adduced on his trial of January 23 and 24, 1978 which resulted in his conviction and original sentence of death, the transcript references in the following statement of facts are to the transcript of the original trial of January 23 through 24, 1978.

James Botsford, an army tank driver stationed at Fort Stewart, Georgia, had known Petitioner and co-indictee Thomas D. Stevens in Army Basic Training. (T. 85-88). Arriving at the Savannah Airport on September 4, 1977, Botsford telephoned the army base to ask about getting a ride from the airport to Fort Stewart. (T. 88-89). He spoke to Petitioner who told him that he and Stevens would pick him up at the airport. (T. 89). About two hours later Petitioner and Stevens arrived at the airport driving a taxicab. (T. 90). After Botsford got in, with Petitioner driving, he was told by Petitioner and Stevens that the cab was stolen. (T. 91, 95).

Stevens informed Botsford that he and Petitioner had forced the cab driver with a knife and knife sharpener to give them money, perform "unnatural acts" and then get into the car trunk. (T. 96). Although Stevens did most of the talking, Petitioner was agreeing with what was said. (T. 93). Stevens then called back to the trunk: "'Are you still there?'" Botsford heard a voice reply, "Yes sir." (T. 97). Stevens showed Botsford a knife and knife sharpener, which he put under the front seat. (T. 97).

During the ride back to Fort Stewart, Stevens called back to the trunk several times asking the cab driver if he was there. (T. 103). Botsford always heard a voice answer. (T. 103). Stevens said that he had sexually assaulted the driver and that they should kill him and burn the car. (T. 100, 101). Botsford asked Petitioner and Stevens to free the driver and he told them that he would not tell the law if they would not kill the cab driver. (T. 100-104). Petitioner and Stevens both agreed to let the driver go. (T. 100, 104).

The following evening, Botsford was visited at Fort Stewart by fellow soldiers Petitioner and Stevens who asked him if he had said anything. (T. 106). When Botsford told them he had not, they said they had freed the cab driver and ditched the car near Pinesville, Georgia. (T. 107). Prompted by a radio bulletin that he later heard regarding a missing cab driver, Botsford went to the State Patrol and the Army Criminal Investigation Department with the information he possessed. (T. 108-109).

An army investigator, John Perzenski, was notified on September 6, 1977 of a missing cab and driver. (T. 134). Perzenski and Clarence Haire, also an army investigator, found a boot on Highway 144 with the name of Roger Honeycutt inside. (T. 135, 136, 141). They found another boot, army socks, and a piece of yellow plastic approximately 200 yards within each other on Highway 144. (T. 137-138, 144-147).

Honeycutt, the missing cab driver, was an army private also stationed at Fort Stewart, Georgia. (T. 121). He drove for the D&M Cab Company on nights and weekends. (T. 120-121).

Haire questioned members of Honeycutt's unit on September 9th in an attempt to locate Honeycutt. (T. 149). One of the men he questioned was Petitioner who told him that he had a friend who called the Shuman Cab Company about 10:00 p.m. on September 4th, but that they did not take the cab when it arrived at Fort Stewart. (T. 149-150). A Shuman cab driver

testified that he did in fact get a call from Fort Stewart on September 4th, and in response thereto, he drove there accompanied by a friend. (T. 129-130). Two men asked him if he had change for $50.00, then left and did not return. (T. 130, 131). They had told him they were going to the airport. (T. 130). As the Shuman cab driver was leaving, the driver saw a D&M cab drive away from a nearby building at about 10:15 or 10:20 p.m. (T. 131).

A Jackson-Denno hearing was held outside the presence of the jury at trial to determine the voluntariness of Petitioner's statements made to Investigator Haire and Wayne County Detective F.J. Shuman. (T. 169-168). The trial court heard testimony from Haire, Detective Shuman and defense witness Dr. Joseph O'Haire, a clinical psychologist. Dr. O'Haire testified that Petitioner had a "mental deficiency" and a "psychopathic personality" that made him want to do wrong. (T. 248, 250). After hearing the testimony, the court ruled that the statements were voluntarily made. (T. 268).

The jury was returned to the courtroom and Investigator Haire testified that he interviewed the Petitioner on September 12th and advised Petitioner of the Miranda warnings. (T. 269-270). Petitioner stated that he did not want a lawyer and would answer any questions posed, after which Petitioner executed a waiver of rights form. (T. 272-273). At first, Petitioner denied any knowledge of Roger Honeycutt or Honeycutt's disappearance. (T. 276). When informed that there existed information that he had been in possession of the missing taxicab, Petitioner made a statement. (T. 278). Investigator Haire related the contents of Petitioner's statement to the court and to the jury. Petitioner stated that when he and Stevens ran out of money while drinking beer at the enlisted men's club, Stevens suggested robbing a taxicab driver. (T. 278-279). The two men summoned a Shuman Company cab, but decided not to take it when it arrived with two men

inside. (T. 279). Petitioner and Stevens then received a telephone call from Botsford, who was at the Savannah Airport, requesting a ride to Fort Stewart. Petitioner agreed to pick Botsford up at the airport. (T. 279).

Stevens and Petitioner next burglarized the dining facility where Stevens got a knife sharpener and Petitioner got a butcher knife. (T. 278). Thus armed, the two men telephoned and requested a D&M cab. (T. 280). When the cab arrived, Petitioner and Stevens asked the driver if he could change a $50.00 bill, and the driver said he could. (T. 280). Approximately fifteen miles away from the army base on Highway 144, as planned by a prearranged signal, Stevens placed the knife sharpener around the driver's neck while Petitioner put the butcher knife to the driver's ribs. (T. 280).

The driver was instructed to pull over and get out, and to give Petitioner and Stevens all of his money. When the driver gave Petitioner and Stevens only $16.00, the two asked the driver if he had more money, and when he stated that he did not, they forced the driver into the back seat of the taxi. (T. 281). Stevens then had the driver remove his boots and clothes which Stevens searched for money. (T. 281). With Petitioner driving, Stevens threw each item of the driver's clothing out of the window after it had been searched for more money. (T. 281). In addition to searching the driver and his clothing, Stevens and Petitioner also searched the automobile for money. (T. 281).

After robbing the driver and forcing him to disrobe, Stevens forced the victim to perform oral sodomy on him. (T. 282). Stevens then performed anal sodomy on the victim. (T. 282). Before they reached the airport, Petitioner and his cohort forced the bound driver into the trunk of the taxicab. (T. 282). Petitioner and Stevens then proceeded on to the Savannah Airport where they picked up their friend Botsford and bragged to him that they had stolen the taxicab and had the

bound driver secured in the trunk. (T. 283). Petitioner and Stevens, in order to convince Botsford of the truth of their story, called back to the driver, requiring that the driver respond. (T. 283). Stevens suggested that they kill the driver, but Botsford protested and asked them not to do so. (T. 284).

After dropping Botsford off at Fort Stewart, Georgia, Petitioner and Stevens drove on to Jesup, Georgia, where they careened up and down several dirt roads to make the car go "from side to side," forcing the victim to roll around in the trunk. (T. 284). The two men then stopped at a convenience store where Stevens removed the taxicab's dome light and hid it in the bushes. (T. 284).

After noticing a patrol car following them for a short period of time, Petitioner and Stevens decided to get rid of the taxicab. (T. 285). The two men drove to a "borrow pit" where they had gone swimming several times in the past. Petitioner and Stevens were careful to wipe their fingerprints from every area of the taxicab. (T. 286). Afterwards, Petitioner raised the lid of the trunk and asked the victim if he was alright. The victim responded that he was, and Petitioner closed the lid of the trunk. (T. 346). Petitioner then started the automobile and drove it into the "borrow pit," jumping from it just before impact with the water. (T. 286, 289). Petitioner and Stevens waited at the scene of the murder, watching the taxicab as it slowly sunk beneath the surface of the water. (T. 286). Petitioner further stated to Investigator Haire that they had tied the victim's hands with cord cut from the taxicab's C.B. radio, and that they had thrown the radio into the bushes beside the "borrow pit." (T. 286). To Investigator Haire, Petitioner admitted that he and Stevens killed the taxicab driver to prevent him from identifying them later. (T. 287).

After completing his statement to Investigator Haire, Petitioner offered to show Haire where the borrow pit was located. (T. 89). Haire and two other men from the criminal investigation office, pursuant to Petitioner's directions, proceeded to the borrow pit. (T. 289). Shortly afterwards, Detective Mike Deal arrived at the borrow pit where the missing taxicab was ultimately recovered. (T. 152, 161). A knife and a knife sharpener were found on the right floorboard of the cab. (T. 157, 158). A body in the trunk of the car was subsequently identified as that of Roger Honeycutt. (T. 306, 308, 311). The victim's death was established as being caused by drowning. (T. 308).

Wayne County Detective F.J. Shuman testified at trial that he took Petitioner from Fort Stewart authorities to the Wayne County Jail on September 13, and advised Petitioner of the Miranda warnings. (T. 319-320). Shuman and Petitioner went over Petitioner's statement to Haire word by word, and Petitioner affirmed to Shuman everything contained in the statement. (T. 322). Petitioner also added that he and a friend returned to the borrow pit to get the C.B. radio, and that the radio was in Petitioner's mother-in-law's automobile. (T. 323).

On September 14, Petitioner directed Wayne County authorities over the same route that he and Stevens had driven the stolen taxicab. (T. 325). The cab's dome sign was recovered from the bushes near a convenience store, and the yellow plastic found on Highway 144 was determined to have come from the taxicab's dome sign. (T. 326, 328, 329).

Further facts will be developed in this response as needed to further illuminate any issue raised herein.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

I. THE CIRCUIT COURT PROPERLY CONCLUDED THAT THE TRIAL COURT'S ALLEGED BURDEN-SHIFTING CHARGE ON INTENT WAS HARMLESS BEYOND A REASONABLE DOUBT, ACCORDINGLY, PETITIONER'S CONTENTION TO THE CONTRARY CANNOT SERVE AS THE BASIS FOR THE GRANTING OF THE REQUESTED WRIT.

Petitioner, Christopher A. Burger, contends that the trial court's instruction on the issue of intent and malice is in conflict with this Court's holding in Sandstrom v. Montana, 442 U.S. 510 (1979) and this Court's more recent pronouncement in Francis v. Franklin, ___U.S.___, 105 S.Ct. 1065 (1985). Contrary to Petitioner's assertions, however, the language of the trial court's charge is not identical to that charge of the trial court invalidated in Francis v. Franklin, supra, but rather, is constitutionally distinguishable from the latter.

In pertinent part, Petitioner's jury was charged as follows:

> Now, by definition, ladies and gentlemen, in our state a crime is a violation of a statute of this state in which there shall be a union of joint operation of act, or omission to act, and intention, or criminal negligence. I give you certain presumptions of law that are applicable to this case.
>
> A presumption is a conclusion which the law draws from given facts. Each of these presumptions are rebuttable. That is, they are subject to being overcome by evidence to the contrary.

I charge you now the presumptions that are rebuttable. Every person is presumed to be of sound mind and discretion. The acts of a person of sound mind and discretion are presumed to be the product of the person's will. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts. A person will not be presumed to act with criminal intention but the jury may find such intention upon consideration of the words, conduct, demeanor, motive and all other circumstances connected with the act for which they (sic) accused is prosecuted.

A specific intent to commit the crime charged in this indictment is an essential element that the State must prove beyond a reasonable doubt. Intent is always a question for the jury, and is ordinarily ascertained by acts and conduct. Intent may be shown in many ways, provided the jury finds that it existed from the evidence produced before you. It may be inferred from the proven facts, or by acts and conduct, or it may be presumed when it is the natural and necessary consequences of the act.

(T.T. at 410-411). Blake v. Zant, 513 F.Supp. 772, 791-792 (S.D. Ga. 1981). (Emphasis Added).

It is with regard to the immediately preceding phrase, " . . . or it may be presumed when it is the natural and necessary consequences of the act," and the trial court's earlier charge that "[a] person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts" th: Petitioner contends his constitutional rights were violated in that the subject charge allegedly relieved the State of its burden of proof on the element of criminal intent. As correctly noted by the district court, and affirmed by the circuit court in Burger v. Zant, 718 F.2d 979, 981 (11th Cir. 1983), there exists no per se rule against charging the truism that a person is normally presumed to intend the natural and probable consequences of his actions. United States v. Chiantese, 560 F.2d 1244, 1255-1256 (5th Cir. 1977). Thus, as stated by the Court in Sandstrom v. Montana, 442 U.S. 510 (1979), citing Ulster County Court v. Allen, 442 U.S. 140 (1969), "[t]he threshold inquiry in ascertaining the constitutional analysis applicable to this kind of jury instruction is to determine the nature of the presumption it describes." Id. at 514. In this regard, the Court stated:

> That determination requires careful attention to the words actually spoken to the jury (cite omitted), for whether a defendant has been afforded his constitutional rights depends upon the way in which a reasonable juror could have interpreted the instruction.

Sandstrom, supra at 14. (Emphasis Added).

Construing the charge as a whole, as required by Cupp v. Naughten, 414 U.S. 141 (1973), every state and federal reviewing court which has ruled upon the merits of this claim has concluded that the charge under attack was not unconstitutionally burden-shifting. (Pretermitting the issue

of burden-shifting, in its last review the circuit court concluded that any burden-shifting effect was harmless beyond a reasonable doubt. Burger v. Kemp, 785 F.2d 890 (11th Cir. 1986).

As noted by the court in Potts v. Zant, 734 F.2d 526 (11th Cir. 1984), in Sandstrom v. Montana, supra, this Court opined that the charge, "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts," without more, might well mislead a reasonable juror into believing that the presumption was either irrebuttable or subject to disproof only if the defendant could demonstrate the contrary "by some quantum of proof which may well have been considerably greater than 'some' evidence -- thus effectively shifting the burden of persuasion on the element of intent." Potts, supra at 533, quoting Sandstrom v. Montana, 442 U.S. at 510. Despite some arguable similarities, the portions of the trial court's charge under attack by this Petitioner are constitutionally distinguishable from those condemned in Sandstrom, supra, and Francis v. Franklin, supra.

Initially, the trial court's charge that intent "may be presumed when it is the natural and necessary consequences of the act," is virtually identical to that charged approved by the circuit court in Hance v. Zant, 696 F.2d 940, 953 (11th Cir.), cert. denied, ___U.S.___, 103 S.Ct. 3544, 77 L.Ed.2d 1393 (1983). Accord, Potts, supra at 533. As noted in Hance, supra, and reiterated in Potts, supra, at 533, the use of permissive language such as "may be presumed" substantially reduces the likelihood that a reasonable juror would conclude that the instruction required an inference of intent. See also Lamb v. Jernigan, 683 F.2d 1332, 1339 (11th Cir. 1982), cert. denied, 460 U.S. 1024 (1983), cited in Rose v. Clark, ___U.S.__ 39 Crim.L.Rep. 3277, 3279 (1986). Accordingly, because the trial court's charge is couched in mere permissive language,

Petitioner's contention that the foregoing portion of the trial court's charge was impermissibly burden-shifting is simply without merit.

With respect to the trial court's instruction that "[a] person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts," the second portion of the charge challenged by this Petitioner, a consideration of the court's charge as a whole reveals that the subject charge created nothing more than a permissive inference. Initially an examination of the court's charge reveals that after giving the foregoing charge, Petitioner's jury was immediately told that "[a] person will not be presumed to act with criminal intention, but the jury may find such intention upon consideration of the words, conduct, demeanor, motive and all other circumstances connected with the act for which they (sic) accused is prosecuted." Next, Petitioner's jury was immediately informed that:

> A specific intent to commit the crime charged in this indictment is an essential element that the State must prove beyond a reasonable doubt. Intent is always a question for the jury, and is ordinarily ascertained by acts and conduct. Intent may be shown in many ways, provided the jury finds it existed from the evidence produced before you. It may be inferred from the proven circumstances, or by acts and conduct, or it may be presumed when it is the natural and necessary consequences of the act.

Blake v. Zant, 513 F.Supp. 772, 791-792 (S.D. Ga. 1981). (Trial tx. 409-410).

As the foregoing reveals, the trial court's use of the "is presumed" language in the challenged charge was quickly clarified by its later, often repeated charge in the permissive "may be inferred" and "may be presumed" language. Secondly, the trial court repeatedly charged that all presumptions were rebuttable and ". . .subject to being overcome by evidence to the contrary." Thirdly, the trial court charged that "[i]ntent is always a question for the jury," that intent may be shown in many ways, provided the jury finds it existed "from the evidence produced at trial," and lastly, that intent "may be inferred" from the proven circumstances surrounding the act for which the defendant was on trial, or that it "may be presumed," when it is the natural and necessary consequences of the act that the State has proven occurred beyond a reasonable doubt.

Preceding all of the instructions aforementioned, Petitioner's jury was thoroughly apprised of the defendant's presumption of innocence and the State's burden of proof on every element of the crime charged beyond a reasonable doubt. (T.T. at 404). Viewing the charge as a whole, and utilizing the reasonable juror test of Sandstrom v. Montana, supra, it is clear that the challenged instructions did not shift the burden of proof on the issue of intent or upon any other element of the offense. The subject instruction created nothing more than a permissive "inference" and Petitioner's contentions to the contrary are without merit.

(ii)

Assuming, arguendo, that the trial court's charge on intent is burden-shifting under the analysis in Francis v. Franklin, ___ U.S. ____, 105 S.Ct. 1965 (1985), which is the assumption the circuit court made in disposing of this contention, 785 F.2d 890, it is the Respondent's position that under the facts of this case the circuit court correctly concluded that this allegedly impermissible burden-shifting charge constitutes harmless error beyond a reasonable doubt.

While in Francis v. Franklin, supra, this Court declined to resolve the question of whether an erroneous charge that shifts the burden of persuasion to the defendant on an essential element of an offense can ever be harmless, in Rose v. Clark, ___U.S.___, 39 Crim.L.Rep. 3277 (1986), this Court resolved this issue in the affirmative.

In Rose v. Clark, ___U.S.___, 39 Crim.L.Rep. 3277 (1986), the Court identified the issue before it for resolution as follows:

> This case presents the question whether the harmless error standard of Chapman v. California, 386 U.S. 18 (1967) applies to jury instructions that violate the principles of Sandstrom v. Montana, 442 U.S. 510 (1979) and Francis v. Franklin, 477 U.S. ___ (1985).

Rose v. Clark at 3277.

The Court began its analysis by noting that in Chapman v. California, 386 U.S. 18 (1967), it rejected the argument that all errors of constitutional dimension necessarily require a reversal of criminal convictions. Citing its recent decision in Delaware v. VanArsdall, 475 U.S. ___ (1986), the Court opined that:

> We have repeatedly reaffirmed the principle that an otherwise valid conviction should not be set aside if the reviewing court may competently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt.

Rose v. Clark, at 3278.

The harmless doctrine, as contained in Chapman v. California, supra, thus recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, and promote public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error. Rose v. Clark, at 3278. Characterizing those interests in support of the Chapman v. California, harmless error doctrine as "strong interests" the Court nevertheless recognized that some constitutional errors are of such a nature as to require reversal without regard to the evidence in a particular case. These automatic reversal errors are those that deprive a criminal defendant of "basic protections" and render the criminal trial an unreliable vehicle for determining guilt or innocence. Examples of such error would be the use of a coerced confession, Payne v. Arkansas, 356 U.S. 560 (1958); complete denial of the right to counsel, Gideon v. Wainwright, 372 U.S. 335 (1963); adjudication by a biased judge, Tumey v. Ohio, 273 U.S. 510 (1972). Rose v. Clark, at 3278-79. As a necessary corollary, a functional harmless error analysis presupposes a trial at which the defendant, represented by counsel, may present evidence and argument before an impartial judge and jury. Rose v. Clark, at 3279.

> Accordingly, if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless error analysis. . . . Where a reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt, the interests in fairness has been

satisfied and the judgment should be affirmed.

Rose v. Clark, at 3279.

Applying these principles, the Court concluded that the Chapman v. California harmless error analysis is applicable to alleged Sandstrom violations. Rose v. Clark, at 3280. In very clear language the Court opined that "[w]hen the verdict of guilty reached in a case in which Sandstrom error was committed is correct beyond a reasonable doubt, reversal of the conviction does nothing to promote the interests that the rule ['the purpose of that rule is to insure that only the guilty are criminally punished' Rose v. Clark at 3279] serves." Rose v. Clark, at 3279. Accordingly, the appropriate harmless error test for a Sandstrom violation, as identified by the Court in Rose v. Clark, supra, requires consideration of the entire record with the question being:

> Whether the evidence was so dispositive of intent that a reviewing court can say beyond a reasonable doubt that the jury would have found it unnecessary to rely on the presumption.

Rose v. Clark, at 3280.

The text of the Court's opinion in Rose v. Clark, supra, readily reveals that the Court was formulating its harmless error analysis in the factual context of a criminal proceeding in which the issue of intent had not been removed as an issue for the jury's consideration. In Rose v. Clark, supra, for example, Clark contended that he was either insane or incapable of forming the requisite criminal intent, thus Clark's defense did not remove the question of intent as an issue for the jury's consideration. Id., at 3277.

Another type of case discussed by the Court was that in which a jury is instructed to presume malice from predicate facts, only after having found the predicate facts to exist beyond a reasonable doubt. The Court noted that in many cases, the predicate facts conclusively establish intent so that no rational jury could find that the defendant committed the relevant criminal act but did not intend to cause injury. With approval the Court cited Lamb v. Jernigan, 683 F.2d 1332, 1342-43 (11th Cir. 1982), cert. denied, 460 U.S. 1024 (1983), stating that:

> In that event the erroneous instructions is simply superfluous: the jury has found, in Winship's, words "every fact necessary" to establish every element of the offense beyond a reasonable doubt. (cites omitted).

Rose v. Clark, at 3279.

Discussing superfluous instructions at greater length, citing Hopper v. Evans, 456 U.S. 605 (1982). In footnote 10 the Court stated:

> As Hopper suggests, it would defy common sense to conclude that an execution-styled killing or a violent torture-murder was committed unintentionally. See Connecticut v. Johnson, 460 U.S. at 99, n. 7 (Powell, J. dissenting). It follows that no rational jury would need to rely on an erroneous presumption instruction to find malice in such cases. Id., at 97, and n. 5.

Rose v. Clark, at 3280, n. 10.

The foregoing discussion by the Court strongly suggests that in a case such as this where the evidence reveals both a violent torture-murder [under Georgia law serious sexual abuse such as aggravated sodomy constitutes torture] and an execution-style witness elimination killing, it does defy common sense to suggest that such a killing was unintentional.

An examination of the record compiled upon the trial of the instant case reveals that Petitioner's defense removed intent from issue at trial as Petitioner's defense conceded the commission of an armed robbery, a kidnapping, aggravated sodomy and the ultimate police murder of the victim. Petitioner's defense, in light of the overwhelming evidence of guilt against him, including his own confessions, was merely one of less culpability because his co-indictee was allegedly the true architect of the criminal enterprise, and the Petitioner was merely a follower.

In the instant case, an examination of the evidence produced at trial reveals that the same overwhelmingly demonstrates Petitioner's guilt of the crimes charged. Under no reasonable review of the evidence can any conclusion be reached other than one that this Petitioner actually committed the murder at issue by first raising the trunk lid of the taxicab to check, making sure that his victim was still bound and alive, after which this Petitioner closed the trunk of the taxicab, got behind the steering wheel and drove the cab into a borrow pit filled with water, jumping out at the very last minute. This Petitioner and his co-indictee stood on the shore and watched the taxicab slowly sink below the water with the victim locked in the trunk and slowly drowning. Because the evidence of Petitioner's guilt is so overwhelming, it is Respondent's contention that the only proper conclusion to be reached is one that the subject charge, if the same is found to be burden-shifting, is harmless beyond a reasonable doubt under the standard of Chapman v. California, 386 U.S. 18 (1967).

Under these facts it defies common sense to contend that the subject killing was unintentional. "It follows that no rational jury would need to rely on an erroneous presumption instruction to find malice in such cases." Rose v. Clark, at 3280, n. 10. Accordingly, under Rose v. Clark's harmless error analysis, the circuit court's opinion regarding the alleged Sandstrom violation should be affirmed.

II. PETITIONER'S CONTENTION THAT HE WAS RENDERED THE INEFFECTIVE ASSISTANCE OF COUNSEL HAS PROPERLY BEEN FOUND TO BE WITHOUT MERIT BY EVERY STATE AND FEDERAL HABEAS CORPUS COURT, AND THUS, THIS CONTENTION CANNOT SERVE AS A BASIS FOR GRANTING THE REQUESTED WRIT.

Petitioner alleges that he was rendered the ineffective assistance of counsel in violation of the Sixth, Eighth and Fourteenth Amendments (1) because trial counsel was allegedly per se ineffective for not presenting evidence on the sentencing phase of trial, and (2) his trial counsel allegedy labored under a conflict of interest.

1.

With reference to Mr. Leaphart's alleged ineffectiveness, Petitioner contends that Mr. Leaphart failed to investigate or prepare for the penalty phase of trial. The legal background against which Petitioner's allegation is to be examined is well-settled. A criminal defendant is entitled to effective assistance of counsel under the Sixth Amendment and due process clause of the Fourteenth Amendment. See Gideon v. Wainwright, 372 U.S. 335 (1963); Powell v. Alabama, 287 U.S. 45 (1932). Effective assistance of counsel, such as will satisfy the requirements of the Sixth Amendment, is counsel "reasonably likely to render and rendering reasonably effective assistance given the totality of the circumstances." Washington v. Strickland, 693 F.2d 1243, 1250 (5th Cir. Unit B 1982)(en banc), cert. granted, ___U.S.___, 103 S.Ct. 2451, 77 L.Ed.2d 1332 (1983). See United States v. Killian, 639 F.2d 206, 210 (5th Cir.), cert. denied,451 U.S. 1021, 101 S.Ct. 3014, 69 L.Ed.2d 394, (1981); Mays v. Balkcom, 631 F.2d 48 52, n.1 (5th Cir. 1980). Respondent further notes that in a capital case the standards for judging effective assistance of counsel remain the same as in any other case, and that the seriousness

of the charges against the defendant is simply a factor that must be considered in assessing counsel's performance. Stanley v. Zant, 697 F.2d 955, 962-963 (11th Cir. 1983). See Proffit v. Wainwright, 685 F.2d 1227, 1247 (11th Cir. 1982). Under this Court's holding in Strickland v. Washington, 466 U.S. 668, (1984), in order to prevail on an ineffective assistance claim:

> First, the defendant must establish that his counsel's performance "fell below an objective standard of reasonableness." (cite omitted). Once that threshold is crossed, the defendant must then demonstrate that "there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different." (cite omitted).

Burger v. Kemp, 753 F.2d at 933.

With the foregoing in mind, Respondent now turns to the facts of the instant case. Contrary to the Petitioner's contentions, Mr. Leaphart testified at the federal habeas corpus evidentiary hearing that in addition to his investigation of the actual facts surrounding the commission of the crimes and the Petitioner's involvement therein, he also investigated Petitioner's background. (H.T. at 35, 37). In pursuing this phase of his investigation Mr. Leaphart acquired several reports from, and conversed with psychologists in Indianapolis who had examined the Petitioner on prior occasions. (H.T. at 35, 50). Mr. Leaphart spoke by telephone and conducted several personal interviews with the Petitioner's mother. (H.T. at 36). Blake v. Zant, 513 F.Supp. at 796 n.6.

Mr. Leaphart testified that he explained to the Petitioner and to the Petitioner's mother the purpose of the retrial on sentencing and the fact that he could "generally put up anything you can find that is good about anybody in mitigation of the sentence." (H.T. at 36). Mr. Leaphart further testified that his background investigation revealed that prior

to entering the Army the Petitioner had been the victim of a broken home, had been in trouble with the police in Florida after which the Petitioner had gone back north to live where he got in trouble with police again. (H.T. at 38). Mr. Leaphart further testified that he questioned Petitioner's mother regarding the existence of potential witnesses that might be used on the sentencing phase of trial. (H.T. at 44). Mr. Leaphart also located and discussed the Petitioner's case with an attorney the Petitioner had allegedly lived with. (H.T. at 44). Mr. Leaphart also testified that his conferences with the Petitioner's mother produced very little helpful evidence that could have been used on the sentencing phase of trial. (H.T. at 64). Throughout his investigation Mr. Leaphart was unable to locate the Petitioner's father, nor did any other member of the Petitioner's family contact Mr. Leaphart or come forward, or offer their testimony. (H.T. at 64).

Prior to trial Mr. Leaphart explained to the Petitioner the nature of the proceedings, how to dress and the proper demeanor for Petitioner to display at trial. (H.T. at 65-66). The Petitioner was advised of his rights and was specifically advised of his right to take the witness stand and testify in his own behalf. Mr. Leaphart testified that he discussed with the Petitioner the issue of whether the Petitioner should take the stand on the sentencing phase. (H.T. at 66). In this regard, Mr. Leaphart testified that notwithstanding the harm that would have resulted from subjecting the Petitioner to cross-examination by the district attorney, Mr. Leaphart was even more concerned with the harmful effects upon the jury of the Petitioner's gloating, indifferent and sadistic attitude.[2] (H.T. at 66). Mr. Leaphart also testified that he

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[2]In this regard, the Respondent notes that at the federal habeas corpus evidentiary hearing even counsel for the Petitioner on this application did not call Petitioner as a witness in his own behalf.

did not place the Petitioner on the witness stand because the Petitioner was unpredictable and he did not know what he would say. (H.T. at 69). Mr. Leaphart further testified that in light of the unfavorable testimony that might be brought out on cross-examination of the Petitioner's mother, i.e., Petitioner's prior encounters as a defendant with the criminal justice system, the potential harm to the Petitioner far outweighed the limited positive testimony that could have been elicited. (H.T. at 68). Obviously, such a strategic decision is of the type generally afforded all trial counsel.

Here on this application for a writ of certiorari, new counsel for Petitioner essentially contends that had he been counsel at trial he would have handled matters differently. Notwithstanding counsel's assertions, Mr. Leaphart is not rendered ineffective merely because counsel here in habeas corpus, with the benefit of the infinite wisdom of hindsight, differs with the strategy used at trial. Contrary to the Petitioner's contentions, Mr. Leaphart's testimony at the federal habeas corpus evidentiary hearing revealed that he was thoroughly familiar with Petitioner's background and that he made a reasoned tactical decision not to put the Petitioner or Petitioner's mother on the witness stand so as to keep from the jury, on cross-examination, testimony regarding the Petitioner's past criminal history. In this regard, the district court and the circuit court properly concluded that the Petitioner's contentions that Mr. Leaphart failed to investigate and prepare for the sentencing phase of trial were all without merit.

Respondent notes that on this application, as in the district court and before the circuit court, counsel for the Petitioner essentially argues that any trial attorney who fails to place the criminal defendant on the witness stand during the sentencing phase of a capital case has rendered ineffective

assistance of counsel, notwithstanding the defendant's background or the trial strategy utilized by defense counsel. Due to the inherent nature of capital litigation, it is the observation of Respondent's counsel that had Mr. Leaphart placed the Petitioner on the witness stand during the sentencing phase of trial, and had Mr. Leaphart used the "lukewarm" character testimony advocated by the Petitioner in the district court below, Petitioner would just as vigorously argue before this Court that Mr. Leaphart had rendered the ineffective assistance of counsel by so placing the Petitioner on the witness stand, thus subjecting him to a damaging cross-examination, and all for the sake of using the "lukewarm" character testimony presently presented and advocated by Petitioner. Obviously, the foregoing assumes that such testimony would have been made available to defense counsel at trial, which assumption is not only unsupported by the evidence adduced at the March 4, 1981 federal habeas corpus evidentiary hearing, but is directly contradicted by the same. As noted by the district court at Blake v. Zant, 513 F.Supp. 772, 802 n. 13 (S.D. Ga. 1981):

> However, many, if not all, the allegations made against Mr. Leaphart are directly contradicted by the record. Thus, they could not possibly be of any benefit to Mr. Burger. On the other hand, the raising of such unfounded charges must have a significant "chilling effect" on the willingness of experienced attorneys, like Mr. Leaphart, to undertake the defense of capital cases. Petitioner's attorneys here might do well to reconsider their apparent policy of routinely attacking the performance of trial counsel in light of this fact.

Respondent notes that it appears inherent in capital litigation that no matter the quality or nature of the assistance rendered by defense counsel at trial, counsel in habeas corpus will routinely contend that the same was ineffective. The instant case constitutes such an example, and Petitioner's contentions of the alleged ineffective assistance of counsel, as the same are totally without merit and without factual support in the record, cannot serve as the basis for the granting of the requested writ.

2.

Addressing Petitioner's allegation of a conflict of interest, Respondent notes that Petitioner contends that the state habeas corpus courts, the federal district court and the Eleventh Circuit Court of Appeals wrongly concluded that Mr. Leaphart, Petitioner's trial and appellate counsel, did not labor under any conflict of interest. Specifically, the Petitioner argues that because Mr. Leaphart was a member of the same law firm as the attorney who represented Petitioner's co-indictee at a separate trial, a conflict of interest existed of such a magnitude as to render Mr. Leaphart's assistance ineffective. In support of his position the Petitioner cites this Court to many cases, however, the cases primarily relied upon by the Petitioner are inapplicable as they relate to the representation at trial by one attorney of multiple defendants. Further, though an obvious fact, Respondent notes that Petitioner has conspicuously failed to note in his brief that he and his companion in the murder received separate trials before separate juries and were in fact represented by separate attorneys.

With reference to the proper legal standard to be utilized in evaluating an allegation of a conflict of interest, the courts below correctly noted:

> A conflict of interest must be actual rather than speculative before the constitutional guarantees of effective assistance of counsel are implicated.

Zuck v. Alabama, 588 F.2d 436, 439 (5th Cir. 1979).

Further, in United States v. Alvarez, 580 F.2d 1251 (5th Cir. 1978), citing Foxworth v. Wainwright, 516 F.2d 1072 (5th Cir. 1975) and United States v. Fannon, 491 F.2d 129 (5th Cir. 1974), cert. denied, 419 U.S. 1012 (1974) the court appropriately opined that:

> Although an accused is entitled to counsel free of conflict and obligations, not every conflict in representation will be so egregious as to constitute a violation of the Sixth Amendment. For example, joint representaion of co-defendants is not a per se violation of the Sixth Amendment.

United States v. Alvarez, supra at 1255.

In an attempt to meet his burden of demonstrating an actual conflict of interest under which Mr. Leaphart allegedly labored, Petitioner presented the testimony of Mr. Leaphart at the federal habeas corpus evidentiary hearing. The Petitioner's obvious intention in calling Mr. Leaphart as a witness was to prove that Mr. Leaphart labored under a conflict of interest due to alleged inconsistent defenses possessed by Petitioner and Stevens, and due to the "disparity in involvement in the two individuals and the disparity in age . . . ." (H.T. at 6).[3] Petitioner's contention made to the district court, repeated on appeal to the Eleventh

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[3]H.T.: refers to the transcript of the March 4, 1981 federal habeas corpus evidentiary hearing.

Circuit Court of Appeals, and presented now to this Court, is that Mr. Leaphart tailored his trial strategy, allegedly to the Petitioner's detriment, in order to protect Thomas D. Stevens. Contrary to Petitioner's contention, however, at the federal habeas corpus evidentiary hearing Mr. Leaphart testified that there existed no conflict of interest and that because Petitioner and Stevens received separate trials before separate juries, there existed no possibility of inconsistent defenses. (H.T. at 15, 62). Mr. Leaphart testified that he used a graph at trial upon which he listed each and every act performed by Stevens as compared to those acts performed by Petitioner so as to dramatically point out to the jury the disparity in the actions of the participants in the murder, the armed robbery, the kidnapping and the acts of sodomy, in an effort to demonstrate the greater culpability of Stevens. (H.T. at 20-23, 62-63). (Petitioner's Exhibit No. 1). On the aforementioned graph, which was introduced into evidence at the federal evidentiary hearing, Mr. Leaphart depicted Stevens as the chief architect of the crime, with Petitioner as an alleged "follower type." (H.T. at 23). As noted by the district court, Mr. Leaphart's habeas corpus testimony was directly supported by an examination of the trial transcript at pages 257 through 262. Further, Mr. Leaphart testified that if "crucifying" Stevens would have helped Petitioner at trial, he would have "crucified" Stevens in an instant. (H.T. at 53).

In his brief to the circuit court, and here on this application for certiorari, Petitioner contends that the alleged conflict of interest was further manifested by Mr. Leaphart's failure to offer Petitioner's testimony against Stevens in exchange for a sentence less than death. The Petitioner fails to note for this Court's benefit, however, that at the federal habeas corpus evidentiary hearing Mr. Leaphart specifically testified that notwithstanding his attempts at plea negotiations the district attorney, confronted

with a brutal and heinous murder and armed with physical evidence and sound confessions from the Petitioner, flatly refused to even discuss plea negotiations. (H.T. at 65).

> Q. Did you ever engage in any plea neogitations in this case?
>
> A. Yes.
>
> Q. Could you tell me the substance of it?
>
> A. Well, we -- I constantly all during the time I represented Mr. Burger tried to negotiate a plea with the district attorney for a life sentence and, he -- during the first trial he just flatly refused to even discuss it in any terms. And, then when we got it reversed on the sentence feature I continued to -- in that time to try to negotiate with the -- with the district attorney about entering a plea, for Mr. Burger to serve a life sentence and, he insisted on trying it and insisted on seeking the death penalty.

(H.T. at 65) (Emphasis added).

As the foregoing readily reveals, contrary to Petitioner's misrepresentations, the district attorney, in a proper exercise of his discretion, completely foreclosed any possibility of plea negotiations.

Also lacking in substance is Petitioner's contention that as a result of some, still as yet unidentified conflict of interest, Mr. Leaphart failed to properly brief and argue Petitioner's case on direct appeal. Again, Petitioner curiously and conspicuously fails to note that it was Mr. Leaphart's actions as appellate counsel which resulted in the Supreme Court of Georgia's first opinion vacating Petitioner's

originally imposed sentence of death. See Burger v. State, 242 Ga. 28, 247 S.E.2d 834 (1978).

Having completely failed to present at the federal habeas corpus hearing any evidence of the existence of an acutal conflict of interest, the Petitioner on appeal to the circuit court, as on this application to this Court, invites this Court to engage in unwarranted speculation and assume the existence of some conflict based upon Mr. Leaphart's failure to argue Petitioner's alleged less culpability on direct appeal to the Supreme Court of Georgia. Again, Respondent notes that Petitioner has curiously failed to inform this Court that while Petitioner did not engage in the actual acts of oral and anal sodomy committed on the victim, the Petitioner did participate in the planning and the actual armed robbery and the kidnapping of the victim. Although Mr. Leaphart commendably attempted to portray Petitioner as the less culpable party before the jury, the fact remains that it was Petitioner who sadistically raised the lid of the trunk of the taxicab, inquired of the victim's well being, then closed and locked the trunk before driving the taxicab into the borrow pit. The evidence is undisputed that it was Petitioner who was the actual murderer. To argue that Mr. Leaphart's failure to contend on appeal that Petitioner, the actual murderer, was the less culpable party, constitutes evidence of the existence of an actual conflict of interest, borders on the absurd.

As correctly noted by every reviewing court below, and concluded by the district court, "[t]he facts thus present no inference of any conflict of interest actual or potential." Blake v. Zant, 512 F.Supp. 722, 796 (S.D. Ga. 1981).

CONCLUSION

This Court should refuse to grant a writ of certiorari to the Eleventh Circuit Court of Appeals as it is manifest that no substantial federal question not previously decided by this Court is presented and the decision sought to be reviewed, in addition to being demonstrably in accord with the applicable decisions of this Court, is soundly based upon a proper construction of federal law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, William B. Hill, Jr., a member of the Bar of the Supreme Court of the United States and counsel of record for Respondent, hereby certify that in accordance with the rules of the Supreme Court of the United States, I have this day served a true and correct copy of this brief in opposition for the Respondent upon the Petitioner by depositing a copy of same in the United States mail, with proper address and adequate postage affixed thereon to:

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This 1st day of December, 1966.

WILLIAM B. HILL, JR.
Senior Assistant
Attorney General
Counsel of Record
for the Respondent

Supreme Court, U.S.
FILED
DEC 11 1986
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No. 86-5375

In the Supreme Court of the United States

OCTOBER TERM, 1986

CHRISTOPHER A. BURGER,
Petitioner,

v.

RALPH KEMP, Warden, Georgia Diagnostic and Classification Center,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED AUGUST 30, 1986
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DATE	NR	PROCEEDINGS
1980		
OCT 02	03	PETITION for Writ of Habeas Corpus
	05	ORDER granting application for a stay of execution.
NOV 26	11	ANSWER of deft to complaint
DEC 01	12	MOTION of Petitioner for discovery
01	13	BRIEF in support of Petitioner's motion for discovery
04	14	MOTION of pltf to amend petition
04	15	BRIEF in support of pltf's motion to amend petition
12		HEARING on petitioner's motion for discovery
12	16	BRIEF in support of respondent's answer
1981		
FEB 21	17	ORDER denying taking of depositions as petitioner requested Granting motion to amend petition and grant a hearing to be held on 3/4/81.
27	19	AMENDMENT to petition for writ of habeas corpus
27	20	RESPONSE AND ANSWER to petitioner's amendments to his petition for the writ
MAR 04	21	MOTION of petitioner for leave to amend petition, with brief

DATE	NR	PROCEEDINGS
1981		
04	22	MOTION of petitioner to present evidence by affidavits, or alternatively. to take depositions.
04	23	BRIEF of petitioner in support of motion to present evidence by affidavits.
04		HEARING held in Savannah on evidence as to allegations now in petition.
30	26	RESPONSE of deft to petitioner's motion to present evidence by affidavits or alternatively to take depositions
APR 29	30	ORDER vacating petitioner's sentence and remanding his case for further proceedings
29	31	JUDGMENT entered this date remanding this case to the Superior Court of Wayne County
MAY 11	32	NOTICE OF APPEAL from the Courts Order dated April 29, 1981
11	33	MOTION of defts to stay judgment of the Court
13	34	ORDER that Court's judgments of April 29, 1981 be stayed to allow the Respondents to complete litigation through the appellate process
21	35	NOTICE of cross-appeal
21	36	APPLICATION for certificate of probable cause to authorize cross appeal
21	37	MEMO in support of application
28	39	ORDER from Court of Appeals allowing appellee to proceed in forma pauperis.

DATE	NR	PROCEEDINGS
1982		
FEB 29	42	JUDGMENT from Court of Appeals reversing decision of District Court Remanded to District Court in accordance with the opinion of Ct. of appeals.
MAR 06	43	ORDER adopting the judgment of the COA as judgment of this Court
SEP 04	44	JUDGMENT from Court of Appeals adopting decision of Supreme Court, remanding case to district court with instruction that within 90 days it extend or revise its findings, and if appropriate, its conclusions and judgment.
OCT 10	45	ORDER finding petitioner's claim of ineffective assistance of counsel is without merit.

SUPERIOR COURT OF WAYNE COUNTY
STATE OF GEORGIA

EXCERPT OF TESTIMONY OF CLARENCE HAIRE

First Trial, *State of Georgia v. Christopher A. Burger*

Indictment No. 77-1641

January 23 and 24, 1978

[Transcript pages 140-141, 278-289]

* * * *

EVIDENCE—CLARENCE HAIRE

* * * *

DIRECT EXAMINATION BY

MR. THOMAS:

Q For the record, would you state for us, please, sir, what is your name, sir?

A Clarence M. Haire.

Q Mr. Haire, what is your occupation, please, sir?

A Special Agent with the United States Army.

Q All right, sir. Who is your immediate boss man?

A Mr. Berzenski.

Q All right, sir. I'll ask you, sir, were you working in that capacity on or about September 4, 1977?

A Yes, sir.

Q I'll ask you, sir, I show you this object marked "S 23", and ask you to look at that particular object for us, please, sir, and see if you can identify for us what do you call that object I just handed to you, sir?

A It's a U. S. Army boot, sir.

Q All right, sir. For what foot is that?

A For the right foot.

Q The right foot. All right, sir. Where was that object the first time you saw it, sir?

A It was sitting along Georgia State Highway 144, on Fort Stewart, Georgia, between Landing Number Two and Landing Number Three.

Q All right, sir. Did you have occasion to be out there on that particular occasion with your boss man, Mr. Berzenski?

A Yes, sir.

Q All right, sir. How do you know that is the same boot that you saw there on that particular occasion, sir?

A Because my initials appear on the inside of the boot; the date and the time appear therein, sir.

* * * *

Q (Mr. Thomas) Now, I'll ask you, Mr. Haire, please, sir, to tell us, please, sir, what statement, if any, did Mr. Burger make to you and Mr. Brewer on that occasion, please, sir?

A Mr. Burger was subsequently asked what he knew about the missing taxi-cab driver, and he initially related that he had no knowledge of what we were talking about. After informing him that we received information that he had picked—had a taxi-cab in Savannah, and that someone—I also made a statement that there was someone in the trunk of the taxi-cab on the night of 4 September. He subsequently stated that he would make a statement concerning what he knew about the incident at that time.

He then was subsequently informed of his rights again. And, after being verbally informed of his rights, he went in and made a statement as to the missing taxi-cab driver.

Q All right, sir. You say you informed him again of his rights?

A Yes, sir, re-emphasized his rights to him.

Q All right, sir. Then, at that time, please, sir, what statement, if any, did he make to you?

A Mr. Burger related that during the evening of 4 September, '77, he and a friend by the name of Stevens were at the Enlisted Men's Club, Fort Stewart, Georgia, and that they had been drinking beer, and they ran out of money. Related that after they ran out of money, they left the club to return to their unit that's located in the National Guard Training Area at Fort Stewart, Georgia.

He then stated that enroute to their unit, Stevens asked him if he knew out they could get some money; or, at least he made the statement to Stevens—Burger that he knew how they could get some money. And, Burger stated how. And, he said that Stevens told him by robbing a taxi-cab driver. He said that they then went on over to their unit as to where they went to their orderly room, and while at the orderly room, they called a Shuman taxi-cab. He said that Shuman taxi came approximately a few minutes later. And, at the time the taxi arrived, that they went out to the taxi and observed that there were two men in the taxi, the driver and one other occupant.

He stated they went out there and after seeing that there were two men in the vehicle, they made some comment to the taxi-cab driver as to where the other man was going, and he told him that he was going to Savannah, and they told the taxi-cab driver they did not want to go to Savannah. He said at this time he left and went back to the orderly room and while they were in their unit orderly room, that PFC Botsford called from Savannah, and he spoke with their CQ, who was a person by the name of Chipman. He said that Chipman was talking to Botsford at the airport in Savannah, and that Chipman asked him if he wanted to talk to Burger, and Botsford told him yes. He said at this time that Burger answered the telephone, and that he then talked to Botsford who was at the Savannah Airport.

Burger then stated after talking to Botsford he told Botsford that they would pick him up. He said that Botsford asked him who he meant by "they", and he told him Stevens. He said that after talking to them then he hanged the telephone up, and then he went back to his billets where he obtained some cigarettes from their wall locker, and then they went to the dining facility located in the National Guard Training Area. He stated that one of the doors was opened to the dining facility. They subsequently went into the dining facility, and obtained a butcher knife and a knife sharpener.

He said that Stevens wanted the knife sharpener. So Stevens kept the knife sharpener, and he took the butcher knife. He stated that they then went to the corner of A Company, Fifty and Thirty-second Armor where there was a telephone on the outside of the building, and they subsequently called a cab from the D &M Taxi-Cab Company in Hinesville. He stated that he told the cab that they wanted to go to Savannah.

He related that approximately five minutes later the taxi-cab arrived. He said that when the taxi-cab arrived they asked the driver if he had change for Fifty Dollars, and the driver indicated that he had change, or at least he could get change for Fifty Dollars. He stated they subsequently got inside the taxi-cab. He got in the front right passenger side. And, that Stevens got in the rear. He said that they had a pre-arranged signal as to where when one of them asked for a light or a cigarette, that this was the signal to rob the taxi-cab driver.

He said that enroute to Savannah at approximately fifteen miles after they had left the National Guard Training Area on Georgia State Highway 144 the signal was given. He said that at this time, Stevens placed the knife sharpener around the man's neck, and that he placed the butcher knife to the man's ribs. He said the cab driver then pulled over without anyone saying anything to him. He said that Stevens then told the taxi-cab driver to get outside of the vehicle. He said that he and

Stevens both then got outside the taxi-cab, and that Stevens asked the man for his money. He said that the man—that after the man gave Stevens the money, Stevens made the comment that he only had Sixteen Dollars. He said that Stevens then handed him Eight Dollars of the money. He said that they then asked the taxi-cab driver if he had any more money, and he said that was all that he had. He said that they then told the taxi-cab driver to get back in the vehicle in the rear, and that he, Burger, then got under the driver's seat of the vehicle, and that Stevens got in the right front passenger seat of the vehicle. He said that they then started enroute to Savannah.

He said that right after they started up, that Stevens told the taxi-cab driver to remove his boots. He said that after the man removed his boots, that Stevens looked through the man's boots to see if he had any money concealed in his boots. He said that Stevens then had the man to remove all his clothing, a piece at the time. He said that Stevens then searched the man's clothing to see if he had any money, and that he did not have any money.

He said that as he searched the clothing that Stevens threw the clothing out of the car. He said that they then proceeded on towards Savannah, toward I-95, and that prior to them getting to I-95 that—or after throwing the money—the clothing out of the vehicle, Stevens then started going through the glove compartment and under the seats of the vehicle, looking for money. Stevens thought the man still—the taxi-cab driver had more money inside the vehicle. He said that Stevens could not find any. He said that after getting on I-95, that Stevens made the statement to the taxi-cab driver that he should make him perform an act, a homosexual act upon him. And, then he stated that Stevens then said, "I will." He said that Stevens then got into the rear of the vehicle with the taxi-cab driver, where Stevens forced the taxi-cab driver to perform an act of oral sodomy on him. He said that Stevens after this was completed,

Stevens then performed an act of anal sodomy on the taxi-cab driver.

He said that they then proceeded on to Savannah. The taxi-cab driver's eyes had been blindfolded in the meantime, and that Burger kept asking the taxi-cab driver as to which road he had to turn off to get to the Savannah Airport. He said that Stevens then—the taxi-cab driver asked him where they were located at on the interstate, and that he would tell the taxi-cab driver, and then the taxi-cab driver would tell him where to turn off at. He said they missed the turnoff to the Savannah Airport, and they went on to the Garden City Exit. He said that when they arrived at the Garden City Exit, they exited the interstate, went down and made a turn around. He said that after exiting the Garden City Exit that they came to a parking lot where they stopped, took the taxi-cab driver out of the vehicle and placed him in the trunk of the vehicle. He said that they then started back up and continued on toward the Savannah Airport.

He said that enroute to the Airport that he asked the taxi-cab driver who was in the trunk by calling out as to what exit he was to take to the airport. He said the taxi-cab driver told him. He said that after they got to the Savannah Airport there was a police vehicle sitting in front of the airport. He said that they then parked out in the parking lot rather than parking up in front of the airport. He said that Stevens then went inside the airport as to where he got Botsford, and that then he pulled the vehicle back up approximately eight lengths behind the police vehicle in front of the airport.

He said that Botsford and Stevens then got inside of the vehicle. They returned to Fort Stewart. Excuse me. Prior to returning to Fort Stewart, he said that Botsford asked him if he had started driving a taxi-cab, and he said that he told Botsford no. He said that Stevens then made the comment that they had took the taxi-cab, and Botsford told him, made the comment to him that he didn't believe it.

He said that he then called out and asked the man if he was okay back there, and he said that the man in the trunk told him yes. He said, "Okay, shut up." He said then that Botsford appeared that he had kind of a dead look on his face, as though he couldn't believe what had occurred. He said that they then returned to Fort Stewart, and enroute to Fort Stewart Stevens made the comment about going to Jacksonville Beach. He said that Botsford said he initially would go with them; however, they would have to return to Fort Stewart and get his car.

Q Just a minute, please, sir.

[NOTE: Whereupon a class of highschool students left the courtroom.]

THE COURT: All right, sir. Proceed.

A He said that Botsford then told him enroute that he did not want to go with them to Jacksonville Beach, just to return him to the Post. He said that he and Stevens then returned Botsford to the Post, and that enroute or somewhere along the line Stevens made some indication that they were going to kill the taxi-cab driver. He said that as Botsford got out of the vehicle at Fort Stewart, and as Botsford was departing the vehicle, Botsford asked them not to kill the taxi-cab driver. And, he also said that Botsford told them not to get burnt.

He said that after Botsford left that he and Stevens then came to Jesup, as to where they road around on some dirt roads, making the car go from side to side, causing the man to roll around in the trunk. He then stated that they came up to a Jack's Minit Market in Jesup, as to where Stevens went inside the Minit Mart to purchase some sandwiches and some milk, and said that he at that time removed the dome light from the taxi-cab, and placed it in some bushes by Jack's Minit Mart. He said that while they were sitting there a patrol car or a police car came up, and that he walked

away from the vehicle toward the Minit Mart. He said that the vehicle, police car—he didn't know what it was doing, so he went inside or started inside, and Stevens was coming out of the Minit Mart.

He said that Stevens seen the vehicle, patrol vehicle, so Stevens took the sandwiches and the milk, and placed it on top of some type of box outside the door of the Minit Mart. He said that he and Stevens then went back inside the Minit Mart, and he asked Stevens if he seen the—or Stevens asked Burger if he had seen the patrol vehicle, and Burger made the statement as to why do you think I'm in here purchasing cigarettes. He said that they then went back and looked back outside the Minit Mart, and the patrol car was gone.

He said they both then went and got into the vehicle and started driving away. He said shortly after they departed the area that the vehicle came up behind them, and that he asked Stevens if that was a patrol vehicle. He said that Stevens told him that he didn't think so.

THE COURT: Let's suspend again just a moment so we can get quiet again.

[NOTE: Whereupon other students left the courtroom.]

THE COURT: All right, sir, proceed again.

A He said that after making the turn at the traffic light that he then observed that it was a patrol car behind them. He said that he then, observing that it was a patrol car, the patrol car started following him, or appeared that he was following him, so they drove up a road as to where they stopped. He said that they pulled up into the road, the patrol car went by. He said that they sat there, and after the patrol car went by, they then started up again and started back out. He said when they came back out, they had seen the patrol car again. So they pulled up in someone's yard.

He said that after they pulled up into the yard the patrol car then disappeared so they then left. He said

at this time Stevens told him or indicated to him that they were going to get burnt, and they had to do something with the vehicle. He said that Stevens then told him to go to a pond which he and Burger went to often here in Jesup. He said that he then drove the vehicle to pond where he pulled up to the—the vehicle facing the pond, and then Stevens told him they had to wipe the finger-prints off the car. He said that after wiping the car then Stevens told him to get inside the car and drive the car into the pond. They said at this time he got in there and started the car, put it in gear and it ran over into the pond.

He said that after the car went into the pond he started to walk away, and Stevens asked him where he was going, and he said that he was leaving. He said that Stevens told him that you can't leave, because we have to make sure—want to make sure the car goes down, with the man in the trunk. So he then stated there until the car went down, and then Stevens and he departed the area, where they went to motel located off 82, and tried to call a taxi-cab driver to return to Fort Stewart. He said that they could not—after an hour or so they could not get a taxi-cab so one finally came by. They stopped him, and that the man returned them to the same area as to where they initially took the taxi-cab from.

Q All right. I'll ask you, sir, what, if anything, did he state to you with reference to the CB radio in that particular car?

A Enroute to Savannah they took the knife, cut the cord off the CB, and tied up the taxi-cab driver's hands. Also, when they arrived at the lake or the pond, they took the CB radio out and threw it into some bushes.

Q All right, sir. Then did you ask any questions, any further questions, sir?

A Yes, sir, I did.

Q What questions were that?

A May I refer to the notes, sir?

Q Yes, sir.

A Burger was asked if he knew what type of underwear the taxi-cab driver was wearing, and he stated that he did not.

Burger was also asked if the taxi-cab driver was in the vehicle when he drove it into the pond, and he stated yes, sir. He was asked why he and Stevens killed the taxi-cab driver, and he stated to keep him from identifying them.

He was asked what time the D & M taxi-cab picked them up at the orderly room of A Company, Fifth Battalion, 32nd Armor, Fort Stewart, Georgia, and he related about 2200 or 2230.

Q What time is that in regular times?

A That's 10:00 P.M. or 10:30 P.M., sir. He was asked as to what time he arrived at the airport to pick up Botsford, and he related he was not sure, but he thought it was about 2400, which is midnight. He was asked if he committed any type of sexual offenses or acts with the taxi-cab driver, and he stated no. He was asked where the taxi-cab driver's wallet was, and he stated that it was thrown out of the car on Georgia State Highway 144 by Stevens. He was asked where the taxi-cab driver's military identification card was, and he stated that he thought it was in the wallet at the time Stevens threw it out. He was asked if he knew the color of the wallet, and he stated that it was black.

He was asked where the knife and knife sharpener were that he and Stevens used during the incident. He stated that it was placed in the front seat of the vehicle. He asked what time he returned from the airport with Botsford at Fort Stewart. And, he stated that he thought it was about 0130 5 September, '77.

He was asked what time he arrived in Jesup, Georgia, and he related it was between 0200 and 0215, 5 September, '77. He was asked what time it was when he drove the vehicle into the pond, and he stated that it was about 0300. He was asked what time he arrived back

at Fort Stewart after he and Stevens killed the taxi-cab driver, and he related that it was about 0400, 5 September, '77.

He was asked if he was threatened in any way during the interview. He stated no. He was asked if he was promised anything in order for him to make this statement, and he stated no. He was asked if he made this statement because he wanted to make it of his own free will, and he stated yes. He was asked if he had anything to add to this statement, and he stated no.

Q All right, sir. At the time he gave you this statement, sir, how was it that this statement was taken down?

A It was initially written out in long hand, sir.

Q All right, sir. Then what was done with it subsequently?

A I typed it up, sir.

Q All right. I'll ask you, sir, in reference to the pond, what statement, if any, did Mr. Burger relate to you in reference to the location of the pond?

A He initially stated that it was located at a—in the vicinity of a trailer park, which after contacting the police in Hinesville we assumed it was a trailer park within the Hinesville, Georgia area. He then stated that it was not there, that he would have to—that he would not be able to tell us where the pond was, that he would have to point the pond out to us.

Q All right, sir. In his statement sir, how was it that he used the word "he went to the pond often" in reference to Stevens and Burger? For what purpose did he say to you, if any, that they went to that pond?

A For swimming, sir.

Q All right, sir. How was it that you went to that pond on that particular occasion on that night, sir?

A Mr. Raymond Brewer, myself, another agent from my office went to the pond with Burger due to the fact that he stated that he would take us to the pond and point it out, as to where he had driven the car.

Q All right, sir. How was it that you all were able to locate the pond where that car was driven into?

A He pointed it out to us, sir.

Q All right. You rode with him in the automobile to Wayne County, sir?

A Yes, sir.

Q All right. In his statement to you, who did he say drove the car into the pond, cranked it up and drove it into the pond, sir?

A He stated that he did, sir.

Q All right, sir. Then, I'll ask you, sir, about how long was it, sir, that—how much time was taken up or consumed during the time you were talking to him in reference to your leaving Fort * * *.

* * * *

SUPERIOR COURT OF WAYNE COUNTY
STATE OF GEORGIA

EXCERPT OF TESTIMONY OF F. J. SHUMAN

First Trial, *State of Georgia v. Christopher A. Burger*

Indictment No. 77-1641

January 23 and 24, 1978

[Transcript pages 199, 345-346]

• • • •

EVIDENCE—F. J. SHUMAN

F. J. SHUMAN, after taking the aforesaid oath, and having been called as a witness for the State in this hearing, testifies as follows:

DIRECT EXAMINATION BY

MR. THOMAS:

Q State for us, please, sir, what is your name, sir?
A F. J. Shuman.
Q I'll ask you, sir, were you working as a detective for and on behalf of Wayne County, Georgia on September 13th, 1977?
A Yes, sir, I was.
Q Did you have occasion to see one Mr. Christopher A. Burger on September 13th, 1977, sir?
A Yes, sir, I did.
Q Do you recall about what time of the evening of that day it was that you saw him, sir?
A Yes, sir, I do.

Q Approximately what time was it?

A It was the time of the morning. It was about thirty minutes after midnight, the 13th day of September.

Q All right, sir. Where was it that you saw him at on that occasion?

* * * *

THE COURT: All right, Mr. Thomas.

MR. THOMAS: Your Honor, would you like for me to continue with Mr. Shuman. I have just a question or two.

THE COURT: All right.

EVIDENCE—F. J. SHUMAN (Recalled)

F. J. SHUMAN, having been recalled, testifies as follows:

DIRECT EXAMINATION BY

MR. THOMAS:

Q Mr. Shuman, I believe you stated that on the night of the 14th, when you talked with Mr. Burger . . .

A Yes, sir.

Q Was it on the night of the 13th that you talked to Mr. Burger?

A Yes, sir, both times.

Q All right, sir. In relation to the water hole, what, if anything, did Mr. Burger say to you at that time?

A Other than verifying that he had driven the automobile in, he said that when the car went into the water he and Stevens ran up the road for fifty or sixty yards, and they returned where the car had gone in the water to see if it had gone under.

He further related that the vehicle floated out from the bank and was some approximately twenty to twenty-five feet from the bank.

Q All right, sir. When was the last time Mr. Burger said he saw Mr. Honeycutt?

A I asked Mr. Burger if he knew whether the man was alive or not, in the trunk. And, he said, "yes, sir,

he was." And, I said, "How do you know?" He said, "Just before the car went in the water on the bank Mr. Stevens was away from the car, throwing the CB radio into the bushes. . . .

MR. LEAPHART: Your Honor, we would at this point renew our objection to any statement made by Mr. Burger, or testifying as to any statement made by him on the ground that any statement to Mr. Shuman is the result of the illegal and unconstitutional statement or confession, or admissions against interest, made to Mr. Haire, at the CID Headquarters at Fort Stewart.

THE COURT: I overrule your objection. Let the record so show.

Q (Mr. Thomas) You may continue, please?

A He said that he, while Mr. Stevens was away from the vehicle disposing of the CB radio, he raised the trunk and asked the man in the trunk was he all right. The man replied, "Yes, sir." And, he closed the trunk down. By that time Mr. Stevens had returned and they put the car in the water, drove it off the bank.

Q Who drove the car off the bank?

A Mr. Burger said that he drove the car.

Q Mr. Burger?

A Yes, sir.

MR. THOMAS: We yield the witness.

MR. LEAPHART: I don't have any questions, Your Honor.

THE COURT: You may go down, Mr. Shuman.

Witness excused.

THE COURT: What do you have next?

MR. THOMAS: The State would rest at this time, Your Honor.

SUPERIOR COURT OF WAYNE COUNTY
STATE OF GEORGIA

TRANSCRIPT OF JURY INSTRUCTIONS

Guilt/Innocence Phase of First Trial,

State of Georgia v. Christopher A. Burger

Indictment No. 77-1641

January 23 and 24, 1978

[Transcript pages 403-414]

* * * *

CHARGE OF THE COURT

Ladies and gentlemen of the jury, the defendant, Christopher A. Burger, in this case, was indicted by a Grand Jury of Wayne County, Georgia at the November Term, 1977 of Wayne Superior Court. He is charged as follows:

"The Grand Jurors chosen and sworn for the County of Wayne, in the name and behalf of the citizens of Georgia, charge and accuse Christopher A. Burger and another named individual with the offense of murder for that the said Christopher A. Burger and another named individual on the 5th day of September in the year of our Lord, Nineteen Hundred and Seventy-seven, in the county aforesaid, did then and there unlawfully, wrongfully, feloniously, and with malice aforethought, kill and murder one Roger E. Honeycutt, a human being, drowning the said Roger E. Honeycutt, all of said act being contrary to the laws of said State, the good order, peace and dignity thereof."

I will tell you now that you will disregard the other named individual entirely, and consider the case as to Christopher A. Burger only.

I charge you that neither the language contained in this indictment nor its return by a Grand Jury of this County constitutes any proof as to the guilt of the accused, Charles A. Burger, in this case. He has entered a plea of not guilty, and I charge you that his plea of not guilty does note constitute any proof of his innocence in the case. The indictment, the language contained in the indictment, the charge contained in the indictment, and the plea of not guilty entered by the defendant do form the issue which you are to try and determine by your verdict.

I charge you that the defendant enters upon the trial of this case with the presumption of innocence in his favor and that presumption remains with him throughout the trial and until and unless the State shall introduce sufficient evidence in your presence and hearing to convince your minds beyond a reasonable doubt as to his guilt.

Now, a reasonable doubt, ladies and gentlemen, means just what it says. It is a doubt of a fair-minded, impartial juror, acting under the sanctity of your oath, honestly seeking the truth. It is not an arbitrary or a capricious doubt, but it is a doubt arising from a consideration of the evidence or from a lack of the evidence or from a conflict in the evidence. If, after considering all the facts and circumstances of this case, your minds are waivering, unsettled, and unsatisfied, then that is the doubt of the law and you should acquit this defendant. However, if that doubt does not exist in your minds as to his guilt, then you whould convict the defendant.

I charge you further, ladies and gentlemen, that you are the judges of both the law and the facts in criminal cases, and this is a criminal case. The law you take from the Court as given you in charge, and the facts you get from the witnesses who testified, and from the evidence

admitted as exhibits, State's Number "1" through whatever number were introduced.

I charge you further, ladies and gentlemen, that you are made the exclusive judges and the sole judges as to the credibility or believability of all the witnesses who appeared and testified in this case. And, in passing upon their credibility or believability, you may consider the witnesses' manner of testifying upon the witness stand, their interest or lack of interest, their means and opportunity for knowing about the facts to which they testified, their reasonableness or unreasonableness of their testimony, their prejudice or bias, if any should appear in the case, and you have the right to consider the personal credibility of the witnesses insofar as the same may legitimately appear upon the trial of this case.

Now, the Court did allow into evidence testimony by the Military CID special agents and by Deputy Sheriff Johnny Shuman relative to certain statements that may have been made by this defendant, Charles A. Burger—or Christopher A. Burger. And, before you consider this as evidence for any purpose you must first decide two questions.

First, was the defendant warned of his constitutional rights, and did he clearly understand and knowingly give up such rights? And second, was any statement he may have made, clearly made made voluntarily and freely?

The rights which must be explained and which must be understood and given by the defendant before any statement is taken by the police, military police or civilian police, are as follows:

That he, the defendant, Christopher A. Burger, had a right to remain silent.

That if he chose not to remain silent, anything he said or signed could be used as evidence against him in Court.

That he had a right to consult a lawyer before any questioning, and to have the lawyer present with him at all times during any questioning, and that if he did not have the money for a lawyer, a lawyer would be provided for him by the State, to represent him, before any questioning and to be present with him during any questioning.

To be admissible, any statement made by Christopher A. Burger must have been freely and voluntarily made, and willingly given, with complete understanding and without any threats or fears, or violence or injury, or even a suggestion of any promise of leniency or reward. A statement induced by the slightest hope of benefit or the remotest fear of injury is not voluntary. To be voluntary, a statement must be the product of a free will and not under compulsion or or any necessity imposed by others.

The burden of proof is upon the State to establish that the warning of all these rights mentioned to you were given, that they were clearly understood and knowingly given up by this defendant, and that the statement was voluntarily and freely and willingly made.

Now, if you find that all of the warnings as to his constitutional rights were given, that the defendant did clearly understand the meaning of what was said, and that he knowingly gave up such rights, and if you further find that any statement he may have made was freely and voluntarily made, then you will consider it as evidence, and you will apply the general rules for testing the believability of witnesses and decide what weight, if any, you give to any part of such evidence. However, if you fail to find any one of the conditions which I have just described to you, you must disregard the statement entirely and give it no consideration in reaching your verdict.

You should consider with great caution the evidence of any admission, statement or incriminatory statements made by this defendant. In weighing such evidence, you

should consider whether the statement was made by this defendant, whether it was truthful, whether it was accurately repeated by witnesses here before you, whether this defendant understood what was said, the circumstances under which it was made, the emotions of hope or fear that may have existed, if any.

You, the jury, may believe admissions or incriminatory statements in whole or in part, believing that which you find to be true, and rejecting that which you find to be untrue. Upon you alone rests the duty to apply the general rules for testing the believability of witnesses and to decide what weight should be given to all or any part of such evidence.

I charge you further, ladies and gentlemen, that in considering the evidence in this case and the testimony in the case, if you find there are conflicts in the evidence about material matters, it becomes your duty to reconcile such conflicts, if you can, without imputing perjury to any witness; the law presuming that all witnesses tell the truth until the contrary is made to appear from the evidence.

If, however, after an honest effort to reconcile such conflict, if you find there are conflicts, you still cannot do so, it then becomes your duty to believe that witness or those witnesses whom you think are most entitled to credit and belief.

Now, the object ofall legal investigation is the discovery of the truth. Direct evidence is that which points immediately to the question at issue. Indirect or circumstantial evidence is that which tends to establish the question at issue, by proof of various facts and circumstances sustaining by their consistency, the hypothesis claimed.

I charge you that moral and reasonable certainty is all that can be expected in a legal investigation. And, whether dependent upon direct or circumstantial evidence, the true question is not whether it be possible that the conclusion at which the evidence points may be

false, but whether the evidence, all of the evidence, is sufficient to satisfy your minds and your consciences beyond a reasonable doubt.

A person will not be presumed to act with criminal intention, but the jury may find such intention upon consideration of the words, conduct, demeanor, motive and all other circumstances connected with the act for which the accused is prosecuted.

Now, under our law every person concerned in the commission of a crime is a party thereto, and may be charged with and convicted of the commission of the crime. A person is concerned in the commission of a crime only if he directly commits the crime, or intentionally causes some other person to commit the crime under such circumstances that the other person is not guilty of any crime, either in fact or because of legal incapacity, or intentionally aids or abets in the commission of the crime, or intentionally advises, encourages, hires, counsels or procures another to commit the crime.

Any party to a crime who did not directly commit the crime may be indicted, tried, convicted and punished for commission of the crime upon proof that the crime was committed, and that he was a party thereto, although the person claimed to have directly committed the crime has not been prosecuted or convicted, or has been convicted of a different crime or degree of crime, or has not amenable to justice or has been acquitted.

In this case two defendants are named; that is, Christopher A. Burger and Thomas D. Stevens. You, ladies and gentlemen of this jury, are to concern yourselves only with the trial of this defendant, Christopher A. Burger. The other defendant is to be tried by other jurors at a different time.

Now, I further charge you that although a person may have been present at or near the scene of a crime, that if he did not in any way intentionally aid, abet, procure, or intentionally participate in the commission of said crime he would not be a party to said crime.

Now, by definition, ladies and gentlemen, in our State a crime is a violation of a statute of this State in which there shall be a union of joint operation of act, or omission to act, and intention, or criminal negligence. I give you certain presumptions of law that are applicable to this case.

A presumption is a conclusion which the law draws from given facts. Each of these presumptions are rebuttable. That is, they are subject to being overcome by evidence to the contrary.

I charge you now the presumptions that are rebuttable. Every person is presumed to be of sound mind and discretion. The acts of a person of sound mind and discretion are presumed to be the products of the person's will. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts. A person will not be presumed to act with criminal intention, but the jury may find such intention upon consideration of the words, conduct, demeanor, motive and all other circumstances connected with the act for which they accused is prosecuted.

A specific intent to commit the crime charged in this indictment is an essential element that the State must prove beyond a reasonable doubt. Intent is always a question for the jury, and is ordinarily ascertained by acts and conduct. Intent may be shown in many ways, provide[d] the jury finds that it existed from the evidence produced before you. It may be inferred from the proven circumstances, or by acts and conduct, or it may be presumed when it is the natural and necessary consequences of the act.

The law permits certain witnesses who have had special training, knowledge and experience in certain lines, such as the doctor from the State Crime Lab and the finger-print expert, to give their opinions as experts, based upon their knowledge of particular matters. I charge you that the weight which is to be given the opinions of expert witnesses is for you to decide. You may

accept it and act on it, or you may reject it, and then act on your own judgment, as you apply it to the evidence in the case.

Now, the specific statute this defendant is charged with having violated at the time and place named in the indictment is that of murder. The definition of our law of murder is: A person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being. Express malice is that deliberate intention, unlawfully, to take away the life of a fellow creature which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears and where all the circumstances of the killing show an abandoned and malignant heart.

A person also commits the crime of murder when in the commission of a felony, he causes the death of another human being, irrespective of malice.

I charge you that if you believe beyond a reasonable doubt that this defendant committed the crime as charged in this indictment, at any time prior to its return by the Wayne County Grand Jury, it would be your duty to convict him. In that event, the form of your verdict would be: "We, the jury, find the defendant guilty."

If you do not believe the defendant is guilty, or if you do not believe that he is a guilty beyond a reasonable doubt, it would be your duty to acquit him, or if there is a reasonable doubt in your mind as to his guilt, it would be your duty to acquit him. And, in that event, the form of your verdict would be: "We, the jury, find the defendant not guilty."

Before you go to your jury room, I do want you to understand that throughout this trial there have been many motions and objections, and statements by counsel for both sides, and by the Court. I emphasize to you that by no ruling which this Court has made during the progress of the trial before you has the Court intimated or expressed any opinion upon the facts of the case, upon

the credibility of the witnesses, upon the weight of the evidence, or upon the guilt or innocence of this defendant. By no portion of this charge has the Court intimated or expressed any opinion upon these matters, each and all of which belong exclusively to you jurors for your judgment and your determination.

The Court states the law. You find the facts. You apply the one to the other, and in that way you decide the outcome of the case.

Under our law you are made the sole judges of the facts of the case. You are the sole judges of the credibility of the witness. You are the sole judges of the weight of the evidence. You are the sole judges of the guilt or innocence of the prisoner at the bar.

Now, when you go to your jury room, ladies and gentlemen, the first thing you need to do is elect your foreman. Then once the bailiff or sheriff, or deputy sheriff brings to you this indictment, and all of the exhibits which were introduced to you, after you received that and after you have elected your foreman, you may begin your deliberations as to the verdict in the case.

Once you have agreed upon a verdict, let the bailiff stationed at your door know of that, and you will be brought back into the courtroom for publication of your verdict. Let your verdict be in one of the forms suggested to you by the Court to indicate your finding.

After all, since the beginning of the word itself, its very origin, the word "verdict" has always related to the word "truth". Therefore, let your verdict speak the truth. It must be unanimously agreed to by all of you, and it must be reduced to writing, and it should be written on the back side of the indictment at the very tip top of the page where it the printed words begin, "We, the jury, find the defendant blank", and there is a blank line there. Then it should be dated this date, signed by your foreman at the place indicated by the printed line, and the word under it, and then returned into open court.

I do repeat your verdict must be unanimous. The twelve of you in the jury box may retire to your jury room. And, the two of you who are alternate jurors may come out into the separate room where you were earlier.

You may retire.

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF GEORGIA
Brunswick Division

TRANSCRIPT OF THE TESTIMONY

Civil Action No. CV280-114

CHRISTOPHER A. BURGER

v.

WALTER ZANT, WARDEN

March 4, 1981

[Transcript pages 12-91]

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EXAMINATION OF MR. LEAPHART BY MR. FARMER:

Q. State your name, please?

A. Alvin Leaphart.

Q. And, are you engaged in the practice of law?

A. Yes, sir.

Q. And, what type of entity are you engaged in the practice of law? What type is it, a Professional Corporation?

A. Professional Corporation.

Q. And, where are you engaged in the practice of law?

A. Jesup, Georgia.

Q. And, what is the style of the Professional Corporation?

A. Gibbs, Leaphart and Smith, P.C.

Q. And, who are the people that are engaged in this corporation with you?

A. Me, and Robert B. Smith. My uncle was Warner Gibbs, and he is dead.

Q. But, primarily now it is you and Mr. Robert Smith?

A. Right. We have an associate Helen Herbler who works with us.

Q. And, is Robert Smith referred to as "Bob?" Is that—

A. Yes, sir.

Q. Is that the way you refer to him? Was this corporation association in business at the time of your representation of Mr. Christopher Burger?

A. Yes, sir.

Q. Did your association, corporation represent Mr. Burger?

A. I was appointed individually to represent Mr. Burger.

Q. All right, sir. And, were you also appointed to represent or some from your professional corporation also appointed to represent Mr. Stevens?

A. Robert Smith, my partner, for the use of no better term, was appointed.

Q. And, when were you appointed to represent Mr. Burger, and when was he appointed to represent Mr. Stevens?

A. I was appointed to represent Mr. Burger probably a couple of weeks after he was—I say a couple of weeks. It was sometime either a week or two weeks after he had been charged with the crime.

Q. Was any attorney representing him before you represented him?

A. Not that I know of.

Q. And, when was Mr. Smith appointed to represent Mr. Stevens?

A. He was appointed along about the same time, the exact date or whether he was appointed before me, or after me, I don't know. I can't tell you that.

Q. But, y'all were engaged in—the corporation was formed at that time, at all times that you represented both Mr. Stevens and Mr. Burger, is that correct?

A. That's correct.

Q. And, you did receive funds for representing Mr. Burger and Mr. Stevens, is that correct?

A. That's correct. I submitted my bill to the County and the check was issued to me. Robert, he submitted his to the County, and the check was issued to him.

Q. And, did those funds become part of the professional corporation?

A. Yes, they did. Deposited in our joint account.

Q. And, they were dispensed according to the terms of the corporation, is that correct?

A. We paid some bills with it.

Q. But, I mean,

A. That's correct.

Q. —they were divided as the corporate agreement is. And, what—

A. We don't have a corporate agreement. We're like shoemakers, I guess, you know, all the children go barefooted. I think we have a corporate agreement. Anyway, we spent the money that was—it went into our common fund, and we spent it. Where it went, I don't know.

Q. All right, but it went into the common fund of the corporation from both Mr. Stevens and from Mr. Burger.

A. That's right.

Q. And, did Mr. Smith work on Mr. Burger's case?

A. He helped me, yes.

Q. And, did you work on—Mr. Stevens case. Help him?

A. That's correct.

Q. And, y'all practice in the same office there in Jesup, is that right?

A. Yes.

Q. And, of course, you talked with Mr. Stevens and you talked with Mr. Burger also.

A. That's correct.

Q. —from the beginning.

A. That's right.

Q. And, at any time did—during the representation, did the Court—did the trial court inquire into or make any determination of whether there was any conflict of interest about the representation?

A. It was never brought up.

Q. All right.

A. We didn't feel that—as I told you before, I never had the gut feeling that there was ever any conflict.

Q. Did you ever mention anything about it to Mr. Burger or Mr. Stevens?

A. We never discussed any—we never discussed that.

Q. And, actually the first time that you were aware that anything was brought—the first time that you were aware about it was when Mr. Hill from the Attorney

General's office called you and told you it was in the petition in Federal Court—

MR. HILL: Your Honor, I want to object to leading questions.

THE COURT: All right, I'm not going to allow you to lead him, Mr. Farmer. I sustain the objection.

MR. FARMER: All right, sir.

Q. When was the first time you were aware that the conflict of interest had been raised?

A. I got a copy of the petition for writ of habeas corpus.

Q. Who sent you that copy?

A. I think Mr. Hill did.

Q. All right.

A. That's where I learned it.

Q. All right. And, did Mr. Hill call you about the appearing here today?

A. Yes, he did.

Q. Did he ask you to come?

A. Yes, sir.

Q. And, you are here pursuant with your agreement with him that you would come?

A. I think you asked me to come too. And, I told you—

Q. But, he had already asked you to come and you had already agreed to come?

A. Yes, sir.

Q. And, nothing was mentioned between you and Mr. Smith ever about a possible conflict of interest?

A. No, sir.

Q. There's been no research of any law about what might be—whether you might have a conflict of interest.

MR. HILL: Your Honor, again I would like to object to leading questions.

THE COURT: All right, Mr. Farmer—

Q. Did you research any law as to make the determination whether there was a conflict of interest?

A. Well, we never thought there was any, so you know, I have enough stuff to look up without hunting things to do. And, I didn't think about it, so I never looked up that particular subject.

Q. All right, sir, what is your understanding of what a conflict of interest is?

A. My understanding of a conflict of interest is basically what the definition of the word is. If you have in this instance, if you have a situation where you're restricted either in your own mind, or in some way going all out to represent an individual because of your relationship with another party involved in that action, or your relationship with some other party who—at all. Anything that would inhibit you either intellectually or as a practical matter from going all out to represent your client.

Q. Are you aware of any decisions by the Georgia Supreme Court about conflict of interest in death penalty cases?

A. I have not read any decisions. I understand—I think you mentioned that there was a decision but I have not read it.

Q. Do you think there is any difference in conflict of representation in death cases than in other cases?

A. I think if you've got a conflict, you've got a conflict. I think if you've got a conflict representing a guy for shoplifting you've got a conflict. It's the same thing as far as I'm concerned. I don't know what the decision says. But, that's the way I feel about it.

Q. Do you think there is more of an opportunity for a conflict in a death case than in a regular case?

A. No.

Q. In—

A. You might point out something that I may not have thought about. But, I don't know of any.

Q. But, I mean, as you sit there now, you don't think of anything?

A. No.

Q. What was the theory of defense in this case? What was the defense to be in this case?

A. Well, of course, my theory of defense was of course trying to make the District Attorney prove his case. And, my theory of defense was to—well, that in effect, in essence what it was. And, use whatever rules of evidence and to prevent him from doing so.

Q. What about in the Tom Stevens case?

A. Same thing, I guess. I did not try the Tom Stevens case. I worked then with—discussed the issues with Bob. We researched the law together. But, in the actual trial of that case I was not involved in it, at either time. He sat in with me in the trial of Burger's case, and helped me. But, I never was involved in his as far as the trial is concerned.

Q. Is there a difference in personalities in you and Mr. Smith, and the expertise? And, if there is, would you describe those differences?

MR. HILL: Your Honor, I would like to pose an objection. I fail to see how that is relevant to his representation of Burger, Mr. Smith's personality. I just don't see the relevancy of it.

THE COURT: I don't know what it is. But, I'm not going to sustain an objection. I might after he starts into it. You may answer.

A. All right. Basically, of course, my partner and I are two different personalities. He's—he went to engineering school and I went to Art school. So, that—and both of us ended up in law school. And, he is a very meticulous engineer type, one, two, three, four, five. And I'm not—I don't go that way. I go from one to four and hope two and three don't show up sometime. I mean, that is just the basic difference in our personality. And, as a practical matter, our—we feel our personalities blend and makes us good partners.

Q. So, there are extra areas in which you have understanding and knowledge and he does not, and vice versa, is that—

MR. HILL: Your Honor, that's—I object. That's not what the witness testified.

THE COURT: The witness will explain.

A. That's not what I meant. I'm only talking about the basic difference in our personalities and the way we approach things. That's all I meant.

Q. Well, does that affect your practice of law?

A. Well, I'm sure that any difference in personality affects a person's approach to things.

THE COURT: Well, make the point, Mr. Farmer. I think every personality is unique. But, how does this relate to this case?

Q. It was a help to this case to have Mr. Smith help you, is that correct?

A. Yes, sir.

Q. Because he has a different view about things than you do in some ways.

A. That's right.

Q. So, it would definitely be an advantage to have your partner assist you?

A. I think it is always an advantage to have anybody assist you that knows anything about a particular subject.

Q. Now, in the trial of this case of what you tried to convince the jury, if I understand correctly, is that you tried to convince the jury that Mr. Burger was less culpable than Mr. Stevens, is that correct?

A. Yes, sir.

Q. And, the evidence supported that?

A. I thought it did.

Q. And, in doing this, I think you brought your file—

A. Yes, sir, it is on that front row, if you—

Q. May I hand you—

A. Yes, sir.

Q. Now, what are the ways that you felt there was a difference in culpability between Mr. Burger and Mr. Stevens?

A. I used an exhibit in Court in my final argument to the jury this is not the same exhibit but this is one I took to Court, and for some reason the Judge would not let me use this particular one. So, I laid it on the counsel table and put a blank sheet of paper up there and promptly copied it. So, this is the same thing.

Q. Does this refresh your memory as to the paper that you used in your argument to the jury?

A. Yes, sir, this is a duplicate of the exhibit that I used to the jury to explain my argument.

Q. All right, sir, let me ask to have this identified.

THE CLERK: It would be plaintiff's exhibit number 1.

Q. I show you this document marked for the purpose of identification Plaintiff's exhibit number 1. And, ask have—I might ask Mr. Hill—have you had an opportunity to see this?

MR. HILL: I've had an opportunity to see it.

MR. FARMER: Okay. Let me ask you this, is there any objection to having it admitted into evidence? I move to have it admitted into evidence.

MR. HILL: I don't have any objection.

THE COURT: Received.

Q. Yes. Now, the question is does that refresh your recollection as to the difference in culpability between Mr. Burger and Mr. Stevens?

A. This is just at the time that I—yes. Yes, sir.

Q. All right. What is the difference in the degree of culpability between the two people that were indicted together?

A. Well, in my approach to the jury, I prepared this exhibit and as you see one is entitled Stevens, and everything under this is what Stevens did. And, one is entitled Burger, and everything under there is what Burger did. And, each one reflects the ages. The ages of each are reflected.

Q. So, the first thing that is shown is that Mr. Burger is the youngest person?

A. Yes, sir, he was 17 as compared to 20.

Q. And, that is a difference of culpability?

A. One of the differences, yes.

Q. All right, and what else?

A. Then the participation of each in the crime, alleged crime, and the sequence of events that the—that it occurred, as they occurred.

Q. All right, sir, would you explain those to us?

A. All right. The first thing that happened was there were two weapons initially used in the kidnapping of the cab driver, which was stolen from—supposedly stolen from the Ft. Stewart—one of the kitchens at Ft. Stewart. One was a long—a rather large knife sharpener, about—I think it was over a foot long, and then a large butcher knife. And, Stevens, had the sharpener and Burger had the knife. And the evidence was that Stevens had sort of planned this situation. And, told Burger what he was—what to do. And, so the first thing that happened that Stevens was to put the knife sharpener on the Cab driver's throat. Which he did. Then, Burger stuck the knife in his side. They were both in the back seat, as I recall, and Stevens had it around his throat, pulling him back over the seat. And, Burger put the knife in his side. In that—that portion of it was to show that Stevens initiated the whole thing and that Burger was merely following his instructions. The—then I have a list of things that Stevens allegedly did which constituted the—I felt the aggravating circumstances in the case which should be attributed to Stevens rather than Burger. One was that Stevens made the driver get out of the cab. Stevens was the one that robbed him, made him undress, made him commit oral sodomy and committed anal sodomy. Then tied him up. Then told him to get in the trunk, then stated to Burger they had to kill him. And, Burger stated that he didn't want to kill him. And, then, Burger told Stevens to drive the car to this pond. All

this took a period of a number of hours. And, then Burger followed his instructions and drove it to the pond. And, then Stevens stated that they must get rid of the car, they must wipe off the fingerprints, and must put the car in the pond. And, at that instance, Burger put the car in gear and it went into the pond.

Q. Now, as to the personalities of the two individuals, Mr. Stevens and Mr. Burger, was there also a difference in the amount of leadership ability, or the amount of ability to follow between these two individuals. Which one was—

A. Well, Stevens appeared to be the leader.

Q. And, did Chris Burger then appear to be a follower type?

A. Yes.

Q. Now, was there a strong legal issue in the case about the statements that had been made by Mr. Burger and by Mr. Stevens to the officers?

A. You mean on the admissibility of alleged confessions?

Q. Yes.

A. Yes.

Q. And, would you explain briefly that situation about the confessions?

A. Well, Burger was originally picked up by the CID, the Army police. And, carried—say at 6:30 in the evening. He was carried to—he was in custody from 6:30 and the evidence that I saw that he was under constant interrogation from 6:30 on until he signed a confession about sometime in the morning, I don't know, maybe around 3:00 in the morning, or four. And, during that time that Burger was advised that he had a right to a military lawyer free of charge and a civilian lawyer—or a civilian lawyer if he wanted to pay for him. And, that was the only advice that he got concerning an attorney up then until the time that he carried them, the police, to the pond where the car was run into the pond and showed them where, you know, where it

was. And, then after that he got in the—after all that, then the Sheriff's department tried to—or did read him his *Miranda* rights, you know, which is more full.

Q. But, this was a legal issue in both Mr. Stevens case and in Mr. Burger's case?

A. That's correct.

Q. And, there was a question as to whether that could be used both by—it was a very serious question as to whether that could be used by the State in the State's mind and in your mind, also?

MR. HILL: Your Honor, I'm going to object. I don't think that this witness can testify as to what was in the District Attorney's mind. And, also I realize we don't have a jury here, but I would appreciate it if Mr. Farmer wouldn't editorialize. I don't know what a strong legal arguments—

THE COURT: Well, I think you are going outside of the bounds of proper examination, Mr. Farmer. I sustain the objection.

MR. FARMER: All right.

Q. In your opinion, was this a—an issue of great significance in this particular case?

A. I thought it was based on the fact that I had a psychologist examine Mr. Burger, and he determined that he had an 82 I.Q. based on the Wexler (phonetic) I.Q. test.

Q. Was there also another issue of venue, or location of the crime that appeared to be a strong issue in the case?

A. Initially we took the position that the jurisdiction of the case was with the Army because of the fact that all three persons involved were Army personnel; that the crime was initiated on the Ft. Stewart Army reservation; and all of the robbery, kidnapping, sodomy, and the other abuses all took place on the military reservation itself and that the fact that the—it ended up in the pond was just the end of the sentence, so to speak. And, we felt that our original position was that since they were all

three military personnel that the Army had jurisdiction and the civil authorities did not. Of course, some of the cases say I was wrong, but that was our position anyway.

Q. But, there were constitutional limitations that may have, in your opinion, that may have restricted the State from getting certainly a death sentence against Mr. Burger and Mr. Stevens, is that correct?

A. Well, I felt that the State didn't, shouldn't have tried the case. I felt that the State did not have jurisdiction. That was my position as far as that was concerned.

Q. Now—

A. That's a legal question.

Q. Sure. Now, if you had not represented, your corporation had not represented Mr. Stevens, Mr. Smith could have helped in your representation of Mr. Burger also, couldn't he have?

MR. HILL: Your Honor, I want to object. That's a hypothetical. I think he ought to question him on the facts of this case. And, for another thing, I think that question is a little unclear. I didn't really understand it myself.

MR. FARMER: I'll reframe the question, withdraw it and reframe it. There's no reason that if the Court had not appointed Mr. Smith to represent Mr. Stevens, that he wouldn't have helped you represent Mr. Burger, is there?

A. Yes, because of the fact that he would have been doing other things. I mean, we wouldn't have—I would have handled—I would have handled Burger's case without any help to amount to anything from Bob. But, I would probably, you know, like anything else, I would have talked to him about it.

Q. He would have consulted, if he had been paid by the State, he would have consulted with you, there was no—wouldn't he have?

THE COURT: I'm not sure I understand the question.

Q. All right.

THE COURT: I understand the situation, what Mr. Leaphart is saying is that if he had not—if Smith had not been employed by the State then they could not have afforded to have used him on the Burger case because he would have needed to have been devoting his duties to other remunerative activities, is that what you are saying?

A. Yes, sir.

Q. He would have been of assistance in helping you, though?

A. If I had called on him. Probably would.

Q. But, it would have benefited you to have had his assistance?

A. I think it benefits anybody to have assistance.

Q. All right, sir. Now, what did the corporation receive in payment from the State for representing Mr. Burger?

A. I forgot.

THE COURT: What relevance does that have, Mr. Farmer?

MR. FRAMER: Your Honor, I think the relevancy is that it shows the facts as I understand it were that they were paid $9,000 for representing Mr. Burger, and $9,000 for representing Mr. Stevens. I think if the corporation is going to receive $18,000 that is a substantial amount of income that could cloud one's opinion as to a conflict of interest. And, I think that—

THE COURT: I don't—I'll let you develop it. I'm not sure that you draw the proper conclusion, or that I understand the conclusion.

MR. FARMER: All right, sir.

Q. Are those figures—

A. I think that's about right. I can't remember exactly, but that sounds about right.

Q. Now,

A. Whatever the records show.

Q. $9,000 for Mr. Burger and an additional $9,000 for Mr. Stevens.

A. I don't know. That's about right. Maybe—I don't know if it was exactly, I don't think it was exact.

Q. Might have been two or three hundred dollars over or under either way?

MR. HILL: Your Honor, I object, he's already testified he doesn't remember. If Mr. Farmer's got some document that reflects what he was paid, I think he should put that into evidence.

THE COURT: I agree. Sustain the objection.

Q. Could you go through your file and get your payment sheets out so we can introduce them into evidence?

A. I don't think they are in here.

PAUSE.

A. I don't think I have them. I think they are part of the record, if you've got a copy of the record. I think I furnished you with a—

THE COURT: Well, let's go ahead, you can get one of your people—

MR. FARMER: All right, yes.

THE COURT: —that shouldn't take but a moment to identify that.

MR. FARMER: All right, sir.

Q. But, you were given substantial payment by the State to represent Mr. Burger and the

MR. HILL: Objection to the leading question, Your Honor, he hasn't testified that he got a substantial payment.

THE COURT: Objection sustained.

Q. Were you given a substantial payment—

THE COURT: Well, he said he was given $9,000 or thereabouts. Let's go on.

MR. FARMER: All right, sir.

THE COURT: I don't suppose he would say "given." Paid.

Q. How many fees in the last four years have you received, your professional corporation received from the representation of any individual in one case that exceeded $9,000?

MR. HILL: Your Honor, I want to pose an objection. I don't see how that is relevant, to the representation in support of Mr. Burger.

THE COURT: I don't see, but I'm going to allow him to answer it, and then we are going to get out of this line of questioning.

A. How many years?

Q. Since the time that you have been representing Mr. Burger.

A. We've received a lot of them to be honest with you. We've received—we received last year, we received a—one fee of about $75,000 and another one of about $50,000 and another one of about $33,000 or $34,000 and a few in the range of $10,000. And, prior to that it was about the same thing. We do a lot of tort work. And, we've been fortunate in the last several years.

Q. Have any of them been for representations of people accused of crimes?

A. I haven't received a $9,000 fee for representing anybody for a crime. I've received a few $1,000 and $2,500 and $500 and what you can get.

Q. But, neither has the corporation received that large a fee for representing anybody in a criminal case?

A. No.

THE COURT: Let's go ahead, Mr. Farmer.

MR. FARMER: All right, sir. What training, or what expertise in the criminal law area as far as death penalty cases have you had or participated in since the time you were in law school?

A. I can't—about ten or twelve.

Q. And, where were they and what time?

A. They were in Wayne County, Jeff Davis County, Long County.

Q. These are cases of people you represented?

A. That's right.

Q. The question I was asking you was have you had any continuing legal education training in the area of criminal law?

A. I've attended a few seminars off and on, but no real—nothing that would make me hold my designate as a criminal lawyer. I'm designated in personal injuries and general trial.

Q. And, have you ever represented anyone in a death case before Mr. Burger?

A. Yes.

Q. Have you ever represented anyone since under the statute that was held facially constitutional in *Gregg*, have you ever represented anyone since then other than Mr. Burger?

A. Which case—is that the one concerning the constitutionality on the grounds—on the death sentence, is that what you are talking about?

Q. Since *Gregg v. Georgia*, have you represented anyone—do you—

A. I don't—I don't remember cases by name, as such. I remember things by principle. You know, I never studied that way.

Q. Are you familiar with the case of *Gregg v. Georgia*?

A. I think so.

Q. What do you—

A. Well, what is it? Is it the one concerning the last—whether or not the last ground or basis for the death penalty was constitutional? Which one was that? I don't know.

MR. HILL: This is not really in the form of an objection, but I think if Mr. Farmer will just give him a date—

MR. FARMER: Well, I—

THE COURT: Wait a minute.

MR. HILL: I think if Mr. Farmer will just give him a date and say have you represented anybody charged with death penalty since that date he could get at what he wants.

THE COURT: I think that would be too.

Q. Okay. Have you represented anyone charged with the death penalty since 1972?

A. Yes.

Q. And, since that time of representing people, have you read Supreme Court of the United States cases about death penalty case work?

A. Yes, sir.

Q. What is your understanding of the law since 1972 as far as death penalty cases?

THE COURT: Now, Mr. Farmer, I'm not going to allow you to give him a bar exam. And, I don't know why this is relevant. So, I'm going to—on my own motion ask you to make your thrust more precisely, or somewhere else.

MR. FARMER: All right, sir.

Q. Are you familiar with the holding in the case in which the Georgia death penalty statute was held facially unconstitutional?

A. Yes.

Q. And,

A. Then it was reenacted.

Q. Yes. What specifically was the holding of the Court in that case?

MR. HILL: Your Honor—

A. I don't remember.

MR. HILL (cont'd): I object. I don't think that is relevant.

THE COURT: I sustain the objection.

MR. FARMER: Your Honor, I would like to make an offer of proof on that to show that—

THE COURT: He said he doesn't know.

MR. FARMER (con't): All right, sir.

Q. Any case since then—

A. Your Honor, I don't want to say I don't know, because I think I've read the thing. But, I can't remember it.

Q. Are you familiar with any United States Supreme Court cases since that time dealing with constitutionality or dealing with any aspect of the procedure of the Georgia death penalty statute, or other death penalty statutes in the United States?

A. Yes, but I can't recite them to you.

Q. All right. Can you give me the name of any case—

MR. HILL: Your Honor, I want to impose an objection. I think the Court has instructed Mr. Farmer either to be more specific or to move on. And, all he is doing is giving a bar exam, like the Court has already ascertained.

THE COURT: All right. I reinvoke my ruling.

MR. FARMER: All right, sir, we would like to make an offer of proof, Your Honor, on this issue.

THE COURT: I'm not going to accept it now. I want to—I think that the question that needs to be—is not whether he-he has all the expertise in the world and is able to give a littany of recent Supreme Court cases, but whether in this case he exercised that standard of care for his client that is required. And, I do not see that the name of cases and all has anything to do with that. So, I'm not going to accept a proffer of proof along that line.

MR. FARMER: All right.

Q. What issues did you perceive to be determined by the jury in this case of Mr. Burger's? What issues were for the jury to make decisions on?

A. Of course, the basic issue was guilt or innocence.

Q. Were there any other issues for the jury to determine?

A. Well, of course, punishment.

Q. And, what criteria would be used in determining punishment?

A. You mean the statute?

Q. Yes, what would be the scope of the proceedings to make those determinations?

A. I don't understand what you are getting at.

Q. Okay. In determining guilt or innocence, what was the jury—what would be admitted before the jury to make that determination?

A. Would be admitted?

Q. Yes, what evidence could the jury legally hear to make determination of whether a person was guilty or innocent?

A. Of murder?

Q. Yes, of the crime that he was charged with.

A. Well, whatever the whole spectrum of the evidence was that was finally admitted.

Q. And, what could be produced by an individual to defend against the evidence that the whole spectrum of the evidence as you call it to show not guilty?

MR. HILL: Your Honor, I want to object. I think that is irrelevant, overly broad. If he wants to ask him questions about—

THE COURT: I agree.

MR. HILL: —this case, then we can move on.

THE COURT: We are talking about this case, Mr. Farmer, and not about what theoretically is possible. I think what you are getting at is what defense and what was available and what did he try to do. Isn't that right?

Q. What was available to be done after he was found guilty?

A. What was available to be done?

Q. Yes, as far as sentencing is concerned?

A. Well, go into the aggravating and mitigating circumstances.

Q. All right. And, what would be the scope of the evidence that could be presented on those issues?

A. Well, of course, it is unlimited as to what you can present. Are you talking about in this particular case?

Q. Yes, I'm talking about in this particular case.

A. It was my judgment at that time that the best approach was the one I took, to argue the difference in their ages, the difference in their participation in the crime.

Q. So age was the relevant issue to have before the jury, participation of degree of leader and following that you have already mentioned, would that be an important issue?

A. Yes, sir.

Q. Issues about what other issues, all the issues you mentioned to us on that chart awhile ago with all the evidence to support all of those issues be important.

A. Yes, sir.

Q. What about other issues dealing with the background of the individual?

A. I elected not to go into the individual into his background, because I felt that by doing so that the end result would be to—would not be to his benefit.

THE COURT: Why?

A. Because of the fact that he had a—he had been involved in a beating and a number of things that indicated violence and stuff at an earlier—

THE COURT: Did you review all of this with the client and with his family, or anyone, people who were interested in him about not exposing this area to the scrutiny of the jury.

A. Yes, sir, I did. I discussed this with him and with his—as I recall, with his mother.

Q. Did you, on page 217 in the transcript it says and this is during the penalty phase of the second trial, on page 217. There is the statement from the Court: "My question I am going to address, are you putting his character in here for the purpose of consideration of the jury," and you say, "no, sir." When you were trying to establish a point with the Court earlier on page 216 the Court asked you: "Are you putting his character in issue?" You say; "no, sir." The Court responds: "You

are getting on the verge of doing so. I will allow this line of questioning to be pursued if it is not your intention to get into that area. What is your purpose." Were you trying to keep his character out of issue?

A. That's right.

Q. And, was it your opinion that if you showed things during this penalty phase of the trial that you would be putting his character in issue?

A. I felt that certain aspects of his character, yes.

Q. Did you ever investigate anything about the background in Indianapolis?

A. I had some reports from psychologists in Indianapolis.

Q. When is the first time you talked to any of his family?

A. Whenever they came to town.

Q. Did you call and tell them about the trial?

A. No, I don't think I did.

Q. Well, the time that the trial was going to happen the first time, you had talked to the family before the—before the supposed—

A. I can't remember. I think I talked with his mother, at some point in time.

Q. Before that.

A. Before the trial?

Q. Before she came to town. You had talked to her.

A. I may have talked to her on the phone. I can't remember.

Q. Did you ask her anything about his background?

A. Yes, I think we discussed it.

Q. Did you explain to her what the penalty phase of the trial was about, and what evidence could be presented then?

A. I don't think I went into that with her.

Q. Did you explain to any member of his family?

A. She was the only member of the family that I remember being involved with.

Q. Did you explain it to Mr. Burger?

A. Yes.

Q. And, what did you explain to him that could be put into evidence?

A. Well, as I recall, anything that would mitigate the circumstances, anything good about him, anything—of course, it was my understanding that that is very broad. That you can generally put up anything you can find that is good about anybody in mitigation of the sentence.

Q. Did you investigate or talk to anybody other than read those reports that his mother brought you, the psychological reports—

A. I—excuse me.

Q. Did you talk to anybody about what they might be able to show about his background?

A. Yes. Of course, we investigated the case and Burger's background, and—

Q. What investigation did you do?

A. Well, talked to the witnesses. Talked to the police officers. Talked to the CID people. Talked to Burger's mother, talked to Burger. Talked to Stevens.

Q. How many times did you talk to Mr. Burger before the trial and for what period of time?

A. I can't remember that. I don't know. A number of times.

Q. How long is the longest time you ever talked to him?

A. Probably about an hour.

Q. On how many occasions?

A. I can't remember that. About maybe a half a dozen times.

Q. And, who other than his mother when she came to town did you talk to?

A. I think that was all I talked to, his mother. You know, in his family.

Q. Did you make any attempt to talk to the other people that he had lived with during his life?

A. I couldn't—didn't know who they were. I knew that he had been in wherever he had come from to go in the Army. He had been—he had lived there. And,

then his mother and father had separated at an early age as I recall. He was down in Florida for a while. Had gotten in some trouble down in Florida and then he went back up North where he lived and got in some trouble up there. And, then he ended up in the Army. And, very basically, I couldn't find anything in Mr. Burger's background which I felt would be helpful. You know, I could have put his mother up, I'm sure. And, she could have said some nice things about him. But, my feeling was that a lukewarm witness would have without any real thing to say would have possibly been harmful. And, I felt—I just decided not to do it.

Q. You decided that after the first trial didn't go right? You tried it twice, didn't you?

A. Yes.

Q. And, after it didn't work that way the first time, you decided the second time you would go the same way you did the first time?

A. I don't know that I tried it exactly the same way the second time.

THE COURT: Marshal, let's take a short recess.

NOTE: RECESS

RECONVENED

THE COURT: Let's continue, Mr. Farmer.

MR. FARMER: Yes, sir.

EXAMINATION OF MR. LEAPHART CONTINUED:

Q. Mr. Leaphart, did at any time during the representation did you talk to the District Attorney about the possibility of Mr. Leaphart (sic) testifying against Mr. Stevens?

A. You mean Mr. Burger?

Q. Mr. Burger, excuse me.

A. No.

Q. There was no discussion of his testimony in exchange for a lighter sentence for Mr. Burger?

A. No, sir.

Q. Did—with the issue, one of the central issues, or key issues being in the case the degree, the difference in culpability of the two parties, did you make issue of this in your briefs to the Georgia Supreme Court?

A. I can't remember whether I did or not. I may have. I don't know. Whatever is in the brief. I believe I have it here somewhere.

THE COURT: I'm sure it is part of the record in the case.

MR. FARMER: If it isn't, we will make it part. I don't believe Mr. Hill has—

MR. HILL: I have not it as an exhibit—

MR. FARMER: We will leave the record open to permit that.

A. I believe I sent you copies. Haven't I sent—I know that when I sent the record to—what is the lady's name, Patsy—

Q. Mrs. Morris.

A. Patsy Morris, that I thought I included copies of all my briefs.

MR. FARMER: We will include those in the record.

Q. It is an issue that should be or should have been before the Georgia Supreme Court?

MR. HILL: Your Honor, I object to the leading questions.

Q. Is it an issue that should have been before the Georgia Supreme Court?

A. I didn't think so. I don't think so.

Q. Why not?

A. On the basis of a jury decision on the—I felt that was a jury decision based on the evidence that, you know, at that particular time.

Q. That the decision of the jury had insulated the Georgia Supreme Court from—

A. No. The issue—I don't think there was any evidence—I don't think the point that—I don't think—of course, that's a legal conclusion. I don't think that point could have been raised on appeal based on that set of

circumstances. As I recall them. What is in the brief—I haven't read the brief lately. I've scanned it, but I haven't read it in depth.

Q. Do you think it is a point—I'm asking you—do you think it is a point that could have been there legally, could you have included that as a matter of law?

A. I think you can always include most any question for the Supreme Court to pass on. Whether they will pass on it or not is up to them.

Q. And, under what theory would you have included that, or do you think it could be included?

A. Well, the only theory would be the lack of evidence to sustain the finding of the jury as to the—what punishment to give. Sufficiency of the evidence would be the only way I could see to raise that issue.

Q. Did you work on the brief in both the Stevens case and the Burger case?

A. Yes, sir.

Q. And, did Mr. Smith work on the briefs in both Stevens and Burger?

A. We collaborated. But I primarily prepared the briefs in both cases on the second appeal. I forget which one of us—the first appeal I forget which one of us primarily worked on those.

Q. Did you at any time make a motion for change of venue in this case?

A. No, sir.

Q. Was there high feelings, adverse feelings in the community about this particular case?

A. Everybody knew about it. It was a well publicized event. The—I don't think it was what you call, —when you talk to me about high feelings, I think somebody is going down and breaking in the jailhouse and trying to lynch somebody. Everybody knew about it. I say "everybody." It was widely known, and people were generally appalled by such a thing having occurred, if it had occurred. I don't think there was any prejudgment on the part of anyone. Always is. But, the majority of the citizens had not, in my opinion, prejudged the situation.

Q. Was there any matter of strategy the reason you didn't file the motion for change of venue?

A. Yes, I felt that the motion for change of venue I didn't think I had the evidence. I couldn't find anyone to prove that—to the effect that he could not have a fair trial in Wayne County. I felt that to file a motion for change of venue would probably--well, I know it would be reported. And, the jury that was finally selected it might have affected them adversely, and I didn't think there was any merit in that.

Q. Was there anyway that you knew or now know that you could have kept that from being reported and become—have an adverse effect?

A. I don't think in a place like Jesup, Georgia, which is a county of—within a county of 17,000 people—seventeen to twenty-one thousand people—that any order of any Court holding down things of that nature would be—well, in any small town that it would have been effective. And, for that reason—you can do all this stuff in Atlanta, and get by with it, as far as the general public is concerned. You may can get by with it in Savannah. But, you can't—you've got to be careful how you handle these things in a small town because of that. Everybody knows what everybody is doing, generally.

Q. And, so you knew of no way that you could keep it from being known?

A. I knew of no effective way I could do it.

Q. Did you consider between the first and second trial did you file for a change of venue?

A. No. You mean did I consider it?

Q. Yes.

A. Or did I file?

Q. Did you file one?

A. No.

Q. And, was there publicity between the first and second trial?

A. It was reported. There were several newspaper accounts of the trial.

Q. Were the people aware of the sentence he had received in the first trial?

A. I'm sure they were.

Q. Were they aware of the evidence that had been presented in the first trial?

A. When you say the people, are you talking about the general public?

Q. Potential jurors, yes.

A. I'm sure some of them knew. I don't think that that was such a—that was as widespread, or something that wasn't widely known.

Q. Did the media report the reversal of the case?

A. As I recall they did. I'm not trying to evade your question, I just—I think they did.

Q. And, it was general knowledge in the community that the people were being tried again for something they had already been convicted of and something they had already been given the death sentence for?

MR. HILL: Your Honor, I want to object to the leading question.

Q. Was there general knowledge in the community that they were being tried for something that they had already been convicted and sentenced to death for?

A. I think it was general knowledge that these two were being retried. We were going to have a new trial involving these two people. What the issues were, I don't think was general knowledge.

Q. What preparation did you do between the first trial and death sentence and the reversal of that, and the new trial? What investigation of potential witnesses for the new trial did you do?

A. I reviewed what I had and just generally reassessed the situation and chose to go like we did.

Q. Did you go see and interview any witnesses?

A. I didn't know of any witnesses other than what I had already had.

Q. Did you interview any witnesses other than on the witnesses for the State, the State's list of witnesses, or potential witnesses?

A. I interviewed, I had, of course, the psychologist that I interviewed and discussed the case with. And, of course, discussed it with his mother. As far as going out and trying to find any additional witnesses, which would help him in the sentencing stage, I did not have any knowledge of any witnesses that—potential witnesses that I thought would have benefitted him. Had I known or had knowledge of any, I would—certainly would have used them.

Q. Did you ask his mother at any time did she know anybody that knew anything about his background?

A. Yes, I know that I did because that's where I got a couple of reports on his—couple of psychologicals.

Q. Did you go see anybody and talk to anybody other than her, then?

A. I talked to a lawyer who she knows, from Burger's —that—Mr. Burger had lived. And, who had known the family. And, I was not given any information by him that helped.

Q. Did you ask him for any information and what information did you ask him for?

A. I asked him for general information. Mr. Burger's mother can probably tell you the name. But, I can't remember.

Q. Did he offer to assist you in—and did you ask him if he would testify for Mr. Burger?

A. He and I discussed the idea of Mr. Burger's history, and he and I both felt under the circumstances that possibly it was best that we not.

Q. Why?

A. Well, this particular lawyer was black. And, I felt that his close association with Mrs.—I didn't know what the association was, I'm not trying to imply there was—I felt that that would have had in the environment there, would have had an ill effect on Mr. Burger's chances.

Q. Explain what you mean then by that?

A. I think that it could have aroused some prejudice that should not have entered into the case. That was a decision on my part and his part not to participate.

Q. Purely because he was black?

A. Purely because of the—I guess you would say that. Both of us felt that it was a danger that we need not chance.

Q. Did you make any determination as to the percent of black people that were in the jury rolls, or in the jury box, the entire box. Did you investigate to see what percent of black people were in the jury box?

A. No, sir.

Q. Did you investigate to see what percent of women were in the entire jury box?

A. No, sir.

Q. Did you investigate to see what percent of young people were in the entire jury box, or panel?

A. No, sir, I did not.

Q. Did anyone do this for you, or do you—it wasn't done in this case?

A. It wasn't done. I knew that roughly probably about a little over fifty percent men, and forty something percent women. And, whatever, maybe about ten percent black, in the jury box. That's what it was and based on my experience that's what it is.

Q. But, you just—you have never checked to see.

A. I know based on experience what it is.

Q. What experience.

A. Trying cases in Wayne County for about 18 years. I know what shows up down there on—when they call a jury.

Q. And, do you know what percent of black people are in the county?

A. About 10 or 12 percent.

Q. And, do you know what percent of young people between 18 and 30 are in the county?

A. No, I don't.

Q. Do you know how, or have you ever investigated from your personal knowledge how the jury is drawn there, how the potential jurors are drawn?

A. Drawn out of a jury box.

Q. Do you know who the jury commissioners are?

A. I can't tell you right off hand who they are.

Q. Have you ever in your 18 years, and I guess sometime in the 18 years there were no black people on the jury, isn't that right?

A. I don't think that's right.

Q. Have you ever talked to any of the jury commissioners to find out how they did compose the box?

A. I've talked to several of them at times.

Q. The box that Mr. Burger's jury was drawn from, did you talk to anybody about that?

A. No.

Q. Do you know—were there any request for charges to the jury in the first trial? Did you prepare any written request to charges to the jury in the first trial?

A. No, sir.

Q. Did you give the Court any oral request for charges in the first trial?

A. I say no, sir. Whatever is in the record. I don't think I did, what the record reflects—but I don't—I don't recall.

Q. Did you brief any issues to the Court in the first trial?

A. In what respect?

Q. In any respect about any legal issue did you brief any issues to the Court?

A. You mean did I submit a brief to the Court on any of the legal issues?

Q. Yes.

A. No, I didn't. Not as I recall.

Q. Did you submit a brief to the Court on the motion for new trial?

A. Was a motion for new trial filed, or was it a straight notice of appeal? I don't remember. I didn't—

if there was one filed I didn't submit a brief because I knew it wouldn't be granted.

Q. Did you raise the issue to the Georgia Supreme Court that they reversed the case on, did you raise that issue in the first trial, did you raise that issue to the Court, or did they do it sua sponte?

A. I think we raised the issues.

Q. In the second trial, did you submit any request to charge to the Court?

A. No.

Q. Did the Supreme Court of Georgia make—did it fail to decide any issue because—or—there was no request to charge before it?

A. Yes, they did. The Court did not charge the definition of kidnapping, or the definitions of various crimes involved in the case nor did it give any instructions at all as to what type of evidence or the various tools the jury could use in deciding the weight and sufficiency of the evidence. We took the position that we didn't have to do that. And, I didn't want them to. I didn't want them to instruct on—

Q. On sufficiency of the evidence.

A. As a matter—I didn't want to tell the Court, didn't want to be in a position of reminding the Court of something that they may have forgotten, which would give me a shot on appeal.

Q. You didn't think it was any benefit to the jurors to—

MR. HILL: Your Honor, I object. I think he should let the witness finish answering the question.

THE COURT: Go ahead and finish the answer.

A. I felt, my reasoning for not filing any request to charge was that I was the—I was the defendant. I was—I don't have to object to the Court's charge in a criminal case, as you do in a civilcase. I did not want to help the Court as I saw it have an errorless trial. And, I felt that that issue was something that was—that did not have to be raised on—request to charge. And, I felt

that a request to charge on those issues and if the Court followed my request to charge we'd be here today and not trying the case down there, would not have made any difference. I was traveling on a technical, what I felt was a technical error of the Court that should have reversed it.

Q. You don't think for the jury to know how to evaluate the evidence makes any difference?

MR. HILL: Objection to the leading question.

THE COURT: Objection sustained.

Q. Do you think it makes any difference for the jury to know how to evaluate the evidence?

A As a practical matter?

Q. As a matter of—

A. As a legal matter it does. As a practical matter, I wonder how much they pay attention to those things I think the jury generally decides the case on what it wants to, other than what is told a man.

Q. And, you don't think the charge makes any difference to the jury?

A. I think the charges that are given in the Superior Courts of our State, I think, tend to confuse the jury more than it does enlighten them.

That's my opinion.

Q. Did you discuss with Mr. Burger not giving them any request to charge?

A. No, sir.

Q. Did you discuss with him anything about the change of venue?

A. I can't remember whether I did or not.

Q. Did you discuss with his family anything about the change of venue?

A. I may have discussed it with his mother.

Q. Do you remember?

A. No, sir.

Q. Did you—you mentioned earlier in your testimony about a psychologist. You never used a psychologist to

the jury in in any trial, guilt or innocence, or any other penalty phase at all, did you?

A. No, sir.

Q. Did you explain to the psychologist the type of evidence that could come in to be admitted in the penalty phase of the trial?

A. Yes, we discussed it. He and I pretty well discussed it.

Q. And, do you think that other evidence that would have supported the things that you argued to the jury a better presentation of that evidence would have been helpful in the jury reaching its verdict?

A. You mean by using the psychologist?

Q. Any other evidence that would have supported the culpability or anything dealing with culpability of—the difference in culpability of the two individuals. Do you think that would have been beneficial?

A. The particular psychologist I had was—gave Mr. Burger an I.Q. test and found it to be 82. And, he also was of the opinion that Mr. Burger was a sociopath with a psychopathic personality. And, on cross examination in the confession phase, this attorney asked, he commented to the effect, I can't remember the exact comment, sociopath was not crazy, he didn't belong in an insane asylum, and he wasn't—shouldn't be treated as a criminal because of his compulsive behavior. But, made something—well, you can't put them in an insane asylum because they will let him out. Didn't know what to do with him. I felt that would be—that and related questions would be asked in the presence of the jury, so I decided at that point not to use the testimony of the psychologist in that phase.

Q. Did you know his opinion before you put him on the stand to testify?

A. I knew what he thought, and I told him to stay away from it.

Q. And, did you seek another opinion from another psychologist?

A. I didn't have one available.

Q. Did you try to get one? Did you make a motion for one from the Court?

A. No. I did not.

Q. Did you do it in the second trial?

A. No. It is the Court invariably when you make a motion for a psychiatrist or psychological examination, they will send them to Central State Hospital for an evaluation. And, the results I've had with personnel at Central Hospital as far as the defense is concerned is it hasn't been good at all. And, the only psychologist that I had available at that particular time was Dr. O'Hare, which I used. And, then because of the sociopath situation I did not use it. Now, I felt that any further examination he would come up with the same definition as a sociopath, and I didn't feel we could improve on our situation. The reason I was using psychologist, my main thrust in using the psychologist, was to attack the validity of his confession. To show involuntary consent in the confession.

Q. Did you ever consider using the psychologist for other things, other than that?

A. I could have—if he had been of the opinion, you know, question of sanity, I could have used that instance, but he was not of that opinion. I did not see the benefit of going out and trying to find the sociologist, or psychologist to use in that particular trial in that particular place, because I did not think that that would be effective. Not the way to do it. I felt the way to try that case was to take the evidence that was there and try to minimize Mr. Burger's participation in the crime. It was my opinion that that was the best way to try this case and that to try to drag in these other people, or some witnesses who may have known something, some little something about him and that would have said something like he was a good boy and went to church, I couldn't find any of those to start with. But, even so, I would not have used that type of witness because I did not think that

that was the way to handle that case. I felt that case should have been tried on the facts and make the District Attorney—I say make him, use whatever rules of evidence to exclude those harmful facts, and then use the—my opinion in representing Burger was then use those facts to show that he was just there and was not entitled to be treated in the same manner as the person who was—who was the main actor in the thing. That he was a secondary, he was in a secondary position. Since there were two punishments in that particular situation, that he should be given the lesser of the two. I think that's the way that case should have been tried, and that's the way I tried it. And, I don't know of—today, if I had to go back and try it again I would do it in the same manner—I say in the same manner, much the same manner, using the same thing and hope I got a different jury. That's all. And, that's it.

Q. Now, did you consider showing degree of culpability between the parties, did you consider showing bad things about Mr. Stevens during Mr. Burger's trial?

THE COURT: Mr. Farmer, I think I've been very tolerant and liberal in this. Now, we're not going to retry everything that happened in the case. You've made certain allegations. I want you to address them. And, then I've got to recess this hearing because I've got other matters and I want to hear the thrust of your argument. This is your opportunity to examine this witness. Let's go on.

MR. FARMER: Yes, Your Honor.

Q. You representing, and your firm representing co-defendants, and knowing that information that would come out about co-defendants past and background that may be excluded at his trial would have affected the co-defendant's trial, is that correct?

A. Run that by me again?

Q. Yes. Bad things about Mr. Stevens' background that came out during Mr. Burger's trial would have hurt Mr. Stevens, is that correct, at his later trial?

A. It was two different juries.

THE COURT: Did you pull any punches in order to protect Stevens?

A. No.

THE COURT: If crucifying Stevens would have helped Burger, would you have done it?

A. Yes, sir.

Q. Did you do it?

A. Didn't have the opportunity.

THE COURT: What was available about Stevens that would have helped him?

A. Nothing that I know of.

Q. Did you investigate to see what was available?

A. We learned as much about both of these men as we possibly could.

Q. Did you go to Mr. Burger's—any town he had ever lived in?

A. No, sir. Except Hinesville.

Q. Did you talk to anybody other than his mother?

A. His mother and the attorney that I told you about earlier.

Q. All right, sir, tell me quickly, give me your educational background if you will?

A. Okay. I was graduated from Georgia Military School in Atlanta, Oglethorpe University where I studied premed for a year. Went to Florida State University where I studied art for about a year. Art Institute where I studied art. Of course, I went into the United States Coast Guard and I was in there for approximately two years, and came back out, worked for my father in his hospital there in Jesup all during the time as an X-ray and lab technician. Then I went to law school at the Atlanta Law School and passed the bar. That was in 1962.

Q. As I understand, you never graduated from college?

A. No, sir.

Q. And, you had what was equivalent to how many units in college did you obtain?

A. I think it was about 3 years.

Q. And, do you know, did you investigate anything about the expertise of any of the people that testified for the state, particularly the person that did the autopsy, did you know anything about his background?

A. Dr. Larry Howard?

Q. Yes?

A. I had known—I knew who Dr. Howard was, I had run into him on other occasions.

Q. Is he a medical doctor, in your opinion?

A. I don't remember whether Dr. Howard is a medical doctor or has a doctorate in forensic medicine. I don't think Dr. Howard is a medical doctor.

Q. Did you do any investigation with reference to any other legal issues in the case other than the jurisdiction issue and the confession issue?

A. Well, we went into admissibility on photographs. Took the position that the admissibility of the nude, decomposed body of the defendant (sic) was a violation of the defendant's rights guaranteed a fair trial and did extensive research on that. And, the—of course, the fact that he was displayed before a jury in the second phase of the trial in handcuffs. We did extensive research on that.

Q. And, that was before the jury?

A. He was placed in an ante room with the door open in a chair with handcuffs on and the jury about two thirds of the jury could see him where they were. We raised that issue. The Supreme Court and—well, the issue in the Supreme Court at that time made a motion for mistrial which was denied. Again raised the issue on appeal to the Georgia Supreme Court and then a petition for certiorari to the U.S. Supreme Court we raised the issue. They would not hear that.

MR. FARMER: Your Honor, at this time I would like to go into a prong of the *McKenna* standard dealing with capable of rendering assistance. Capable of rendering effective assistance. And, to do that I would like to—I'm asking the Court at this time because the Court has

ruled that I couldn't go into his understanding of the law. But, to go into that I need to ask him questions about the law. And, I would like to go into that, or make an offer of proof as to that prong of *McKenna* standard.

THE COURT: What is the State's response?

MR. HILL: Your Honor, first of all, I'm about like Mr. Leaphart. I don't remember these cases by names. If Mr. Farmer can tell me exactly what he's talking about. But, if he's talking about what I think he's talking about, I'm going to object because I think the issue here is what he did in this case. Not what his overall expertise in the law is concerned. I think we ought to confine ourselves to this case. I'm going to object.

THE COURT: Be a little more specific, Mr. Farmer.

MR. FARMER: Yes, Your Honor, I think that two standards under *McKenna* that are capable of rendering effective assistance, as I know this Court so well knows because the Court's—have written several opinions in this area. Just had one come back to—from the Fifth Circuit affirmed. And, then rendering, I think the rendering deals with this particular case, but I think the capable of rendering deals with the judgments that he made, his knowledge of the law.

THE COURT: Mr. Farmer, I don't think I'm going to go into that. I'll take another look at it. If I decide I am wrong in this regard, I'll reopen it and we'll come back and do it. But, I don't think I—I'm going to sustain the State's objection to it.

MR. FARMER: And, Your Honor, and that I'm not allowed to make the offer of proof?

The COURT: That's right. If I determine that I should have I'll just have to reschedule a hearing.

MR. FARMER: All right, Your witness.

THE COURT: You may examine.

CROSS EXAMINATION OF MR. LEAPHART BY MR. HILL:

Q. Mr. Leaphart, you went into your background very briefly. After you graduated from law school, where were you employed as an attorney?

A. I was employed with Judge Durwood Pye in Fulton County Court House in Allen, Georgia, as a law clerk.

Q. How long did you work with the Judge?

A. I worked for him for a little over a year and a half.

Q. All right, and then afterwards, what did you do?

A. Came back to Jesup, Georgia, and began practicing law with my uncle.

Q. All right, and how long were you in fact in Jesup prior to the time you represented Mr. Burger?

A. I came back to Jesup in 1963 and was in—

Q. About 14 years? Are you originally from Jesup?

A. Yes, sir.

Q. Is your family from Jesup?

A. Yes, sir.

Q. And, does your family have a long history in Jesup? Are they—you have a well established family line, then?

A. Well, we've been around there for a long time.

Q. All right.

A. My great grandfather came down there around the turn of the century as a doctor. And, then grandfather was a district attorney down there from around 1920 to around 1940 when he went to Congress. And, then my uncle was a lawyer there in Jesup and City Solicitor and State Court Judge until he died a few years ago. And, then my father was a doctor and my brother practices law in South Carolina.

Q. For a while you were a judge in Jesup, is that correct?

A. I was a judge long enough for them to have an election and decide they didn't want me around.

Q. You were a State Court judge, though?

A. Yes, sir.

Q. All right, have you served on any committees or organizations as a practicing attorney?

A. Well, I've been county attorney for Wayne County. And, I've served in that capacity for a total number of years, about 14 years. I did not serve for a period of one year. I represent the Board of Education. I've represented them for—since they existed back in Jesup. I'm a member of the Board of Governors of the State Bar Association. And, I'm a Member of the Georgia Trial Lawyers, and American Trial Lawyers.

Q. All right. At the time you represented Burger in the fall of 1977, approximately percentage of your practice was devoted to criminal law?

A. About 15, 20 percent.

Q. And, on direct examination you testified that you have represented criminal defendants in cases where the death penalty was pursued?

A. Yes, sir.

Q. Have you ever represented a defendant in a death penalty case where he was not convicted of murder, was acquitted?

A. Yes, sir.

Q. And, have you represented criminal defendants where the death penalty was pursued and the death penalty was not obtained by the district attorney?

A. Yes, sir.

Q. All right. Now, I think it was brought out on direct examination, you represented Burger through his first confiction, his appeal to the Georgia Supreme Court, the remand for the retrial on punishment, through that trial, through the appeals of the Georgia Supreme Court, and on petition for certiorari to the U.S. Supreme Court?

A. Yes, sir.

Q. All right. So, you were thoroughly familiar with the facts in Mr. Burger's case? Having been associated in it so long?

A. I think so, yes.

Q. Now, when did your representation of Mr. Burger terminate?

A. Whenever the Supreme Court of the United States denied our writ of certiorari.

Q. All right, Can you tell me the circumstances surrounding that? I mean, what did you do after you terminated and what did you do with the trial transcript and records?

A. This Patsy Morris, who is with the ACLU contacted me and because I could not under the law as I saw it, I could not continue as appointed counsel, with a petition for writ of certiorari and writ of habeas corpus, and she notified me and I got the transcript of both trials, copies of the brief, copies of the record, transmitted them to her. And, she had engaged a lawyer who I think became associated with Mr. Farmer.

Q. All right, now, prior to the time I provided you with a copy of the petition for writ filed in this case, you weren't contacted by Mr. Farmer, or the attorney who was originally associated about your representation in this case, were you?

A. No, sir.

Q. Nobody talked to you about it?

A. No, sir.

Q. And, the first time you knew you were charged with ineffective assistance of counsel, was when I sent you a copy of the petition?

A. That's correct.

Q. All right. Now, will you tell me the circumstances surrounding your appointment to the case? When did you find out you were appointed?

A. The Clerk called me up and said—I think it was Judge Knox, wanted me to represent him.

Q. All right, and then you—after you found out you were appointed, you went over and talked to Burger while he was in jail there in Jesup?

A. Yes, sir.

Q. And, you all talked about the case?

A. Yes, sir.

Q. And, he basically told you he did it, and he told you everything he told the police in his confession?

A. As I recall it was pretty close to it.

Q. All right. And, during your conference with Burger, that initial conference, you weren't able to find out from him any evidence that might have been beneficial to him as far as his involvement in the crime?

MR. FARMER: I object to Mr. Hill's leading the witness. I think if he wants to—

THE COURT: Well, both of you gentlemen have done that. Normally he would have the right—

MR. HILL: I think he's—I've got him on cross.

THE COURT: Well, only technically.

MR. HILL: Technically.

THE COURT: Don't lead the witness.

MR. HILL: Yes, sir.

Q. During your first conference with Mr. Burger, was he able to provide you with any information that might have been beneficial to him as far as his defense was concerned?

A. The only information he gave me that I felt was beneficial to his defense at that time was the fact that he had been interrogated by the CID some number of hours, I forget. At that time, I don't know if I had the exact number, and then grilled, from the early evening into the early morning. He told me he had not been advised of his rights, and I didn't know—you hear that a lot. And, I had to check that out. And, one of the things that he told me that I learned was the relationship of the three parties being involved in the—all involved in the United States Army.

Q. All right. And, after Mr. Burger told you that he was not properly advised of his rights, you moved on that information to do some investigation?

A. Yes, sir.

Q. What stage of Mr. Burger's criminal proceedings were you appointed?

A. I was appointed—I think it was about a week or so after he was arrested.

Q. So, you were appointed early on in the case?

A. Yes, sir. I think I was appointed soon enough.

Q. Now, regarding the allegation of a conflict of interest, I think you testified in direct that was nothing that presented you from going all out for Mr. Burger?

A. That's correct. Nothing ever arose that I felt was a conflict. I was prepared to—

Q. And, if I recall correctly, Mr. Burger and Mr. Stevens had a separate trial?

A. Yes, sir.

Q. Now, there is an allegation in the petition that you failed because of this conflict, alleged conflict, you failed to raise certain issues on appeal. Are you familiar with that allegation?

A. I know it is in the petition.

Q. Was there any set of circumstances that prevented you from raising any allegation that you felt had merit?

A. I don't know of—I raised every allegation that I could find.

Q. All right. Now, the petition also alleges that in his petition you failed to distinguish the acts committed by Mr. Burger and Mr. Stevens. Are you familiar with that allegation?

A. Yes, sir.

Q. You just testified using petitioner's exhibit 1, that you in your closing argument to the jury made a special effort to point out to the jury the differences in the acts?

A. That's correct. Also during the trial of the case I think we made a number of objections, of course, in the presence of the jury stating that our objection was that these were acts that were done by Stevens rather than Burger.

Q. In addition to the objections you made during the receiving of testimony, do you recall making any objections during the opening statement of the District Attorney along these same lines trying to distinguish—

A. I think I did. The record I think would correct me.

Q. Do you recall the substance of your cross examination of James Boxford in this case?

A. Not right off the top of my head, I don't.

Q. Do you recall in your cross examination trying to make a distinction between the acts performed by Burger and Stevens?

A. I think I cross examined Boxford on the—as to what went on when they picked him up in Savannah in an effort to establish that all of the—Stevens was the moving party.

Q. All right. Now, at the time you had your first conference with the petitioner who besides yourself and the petitioner was present?

A. I think we were alone.

Q. Now, you testified on direct that you interviewed State's witnesses, the ones that had information pertinent to this case. Is that correct?

A. Yes, sir.

Q. Did the petitioner ever provide you with the names of any witnesses that might have proved helpful to him at trial?

A. No, sir.

Q. I think you testified that you were instrumental in securing a psychological evaluation of the petitioner? Did you do that at your own expense?

A. Yes, sir. Well, I submitted it, I'm sure when I submitted my bill I'm sure it was included as an out of pocket expense which I was reimbursed for.

Q. All right. You also testified on direct that you had the occasion to talk to petitioner's mother—

MR. FARMER: Your Honor, I would ask Mr. Hill to ask the questions and not keep informing the witness what he testified to.

MR. HILL: I'm just directing,—

MR. FARMER: Leading questions.

MR. HILL: Leading questions.

THE COURT: All right, gentlemen, don't have any colloquy between yourselves. Examine the witness as though he were not on cross examination on direct examination.

MR. HILL: Yes, sir.

Q. Do you recall having any discussions with the petitioner's mother about petitioner's background?

A. Yes, sir.

Q. Was she able to give you any information that might have proved helpful to the petitioner at trial?

A. No, sir.

Q. Were you ever able to locate the petitioner's father?

A. No, sir.

Q. Other than the petitioner's mother, did any other member of his family contact you regarding this case?

A. No, sir, I don't believe so. Wait a minute, he was—Burger was married at that time. She immediately left him.

Q. Are you referring to his wife?

A. Yes.

Q. Were you ever able to locate her?

A. No, sir. I didn't know where she went.

Q. Did you ever engage in—

A. I think that's right.

Q. Did you ever engage in any plea negotiations in this case?

A. Yes.

Q. Could you tell me the substance of it?

A. Well, we—I constantly all during the time I represented Mr. Burger tried to negotiate a plea with the district attorney for a life sentence. And, he—during the first trial he just flatly refused to even discuss it in any terms. And, then when we got it reversed on the sentence feature I continued to—in that time to try to negotiate with the—with the district attorney about entering a

plea, for Mr. Burger to serve a life sentence. And, he insisted on trying it and insisted on seeking the death penalty.

Q. What type of client was Burger, was he cooperative, etc.?

A. He was cooperative to—he was as cooperative as he could be. He failed to follow one of my basic instructions.

Q. What was that?

A. Asked him not to say anything to anybody about what he was charged with. He talked a good deal to others about what he did. Did that voluntarily over my instructions. Other than that he was cooperative.

Q. Did Burger enjoy talking about the crime?

A. That was my understanding.

Q. Prior to the time you went to trial, did you talk to Burger about what he should wear to Court, his demeanor in the Court?

A. Yes, sir. We got him some conservative clothes. And, as I recall I think he may have had a sport coat, I'm not sure. But, I know he had a white shirt and slacks.

Q. Did you advise him of his legal rights at trial, as far as his right to testify, etc.?

A. Yes, sir, we discussed that. I felt that under the circumstances that subjecting Mr. Burger to cross examination by the District Attorney would be very harmful.

THE COURT: How about the punishment phase? Did you consider whether or not to allow him to testify at that phase?

A. Yes, sir. It was my opinion that for him to testify would have—the risk, the risk—

THE COURT: What were you apprehensive concerning? Him gloating about it, or—

A. Yes, sir—

THE COURT: —what would have been the possible ill consequence to have flowed for him testifying at that phase?

A. His attitude.

THE COURT: Manifested how?

A. Indifference and even to the point that he may have gotten some sadistic—I don't say that would have come out, but I was fearful that that would manifest itself, to the jury.

Q. Did you give any consideration to the sequence of your closing arguments as far as the presentation of evidence was concerned?

A. I don't understand you. You mean did I prepare my closing argument in some design?

Q. No, that's not my question. My question is were you concerned with retaining your opening and closing arguments in the trial of Mr. Burger's case?

A. Yes, sir. I was.

Q. Did that influence your decisions on whether or not to present certain witnesses?

A. Yes, sir.

Q. Was that decision also influenced by the strengths and weaknesses of the—

MR. FARMER: I object to his leading on this crucial issue area. He might ask the direct question.

THE COURT: Objection overruled. Go ahead and ask the question. I'm the only one presiding.

Q. Did the weaknesses and strengths of these witnesses vis-a-vis your opening and closing arguments have a bearing on your decision as to whether or not to present them?

A. Yes, sir. I didn't have any witness I thought was particularly strong. And, I felt that the use of those witnesses versus the loss of the final argument to the jury, that I shouldn't do it. I felt that it was more advantageous to maintain that.

That was in the trial in the original case.

Q. Are you familiar with most of the people in Jesup who serve on the juries from time to time?

A. I'm familiar with a great majority of the people on the jury, I believe. Those I am not familiar with when I get the jury list I familiarize myself with.

Q. And, was that one of the considerations that govern your decision as to whether or not to file a motion for change of venue?

A. Yes. I basically felt that was about as good a place as any to try it. That people in Jesup are, I guess you don't like to talk in favor of your county to the detriment of others, but I've found that the people in Jesup were better educated and more liberal minded than the other counties in the circuit. I certainly didn't want to try this in Baxley or Hazelhurst. I don't know the people in Brunswick. Didn't want to try it down in any of the other counties. I was satisfied with the jury in Wayne County, as such. It was just a difficult case to try anywhere.

Q. And, were these same considerations exercised in making a decision of whether to file a challenge to the composition of the array?

A. Yes, sir. I was satisfied with the array that the jury had been reorganized some I recall some years ago. We were constitutionally all right. And, I felt a challenge to the array would just simply aggravate and probably—potential jurors, and they would have—and it would hurt him. I didn't feel, I didn't feel that that maneuver would benefit him. I felt it would have harmed him.

Q. For the purposes of the record, is the petitioner black or white?

A. He's white.

Q. Did you consider calling the petitioner's mother as a witness the trial?

A. Yes, sir.

Q. What was your ultimate decisions?

A. I decided not to call her because I felt that she could not add anything to it as such, other than being a mother and saying I don't want you to put my child in jail, or the electric chair. I don't think that she—she would have been subject to cross examination as to certain things that he had been involved in. I didn't think his mother under those circumstances should testify.

Q. Did you also give any consideration to what impression her appearance might make upon the jury?

A. Not really.

Q. Why did you not call the petitioner during the *Jackson-Deno* hearing?

A. I didn't want him to be subject to cross examination. I didn't know what he would say.

Q. Was this also one of your considerations for not calling him at trial?

A. Yes, sir.

Q. On both phases?

A. Yes, sir.

Q. In preparing for the *Jackson-Deno* hearing, what witnesses did you talk to?

A. I talked to—in preparing for the *Jackson-Deno* hearing we had a earlier petition for writ of habeas corpus that we filed at which time we had the investigating officers from the CID. I think two of them were present. We cross examined at that time concerning the confession. And, that's what when we got the—we used that in preparation for the *Jackson-Deno* hearing.

Q. Now, the items listed on the chart, what's been identified as petitioner's exhibit number 1, do those constitute all the differences in acts that you argued to the jury?

A. Basically, yes. I'm sure there was—used this as a guide, and I'm sure I mentioned other differences at the time and what they were, I don't remember.

Q. The motion—your arguments dealing with the jurisdiction of the Court to try the case as opposed to the jurisdiction of the Federal Government, what were some of the considerations you had in mind in pursuing that motion?

A. You mean the original motion?

Q. Yes, sir.

A. Well, I took the position that the defendant was a—that the Burger and Stevens and Honicutt, the victim were all members of the Armed Forces, U.S. Army. It

took place on the U.S. Army reservation. And, all of the acts of violence took place there. With the exception of the culmintaion of the act, murder. I felt that the federal court should have—I mean the Army should have jurisdiction, or had jurisdiction. Of course, there's some recent decisions that I did not have at that time which state it is different.

Q. Did you consider that the Army would not be seeking a death penalty?

A. That was one of the reasons we wanted to get him—try to get the jurisdiction back in the Army because of the fact that I don't think they have executed anybody in—what? Since 1940 something. As I recall.

Q. You testified that you submitted—did you submit any request to charge?

A. No, sir.

Q. Could you tell me concisely why you didn't?

A. Well, I didn't want to—

THE COURT: He already answered that as you lawyers frequently do, he was trying to trap the Judge.

MR. HILL: Yes, sir, I was just trying to get it that clear and that precise.

A. I don't want to quite say it that way, Your Honor.

THE COURT: It comes down to the same thing.

MR. HILL: Your Honor, I have what is marked as respondent's exhibit 1 and 2. And, I would like to hand those to—

THE COURT: What are they?

MR. HILL: Respondent's exhibit 1 is a certified copy of the record on the retrial of resentencing. And, Respondent's exhibit number 2 is a certified copy of the first trial, the guilt and innocence phase.

MR. FARMER: No objection, to either.

THE COURT: They are received.

MR. HILL: Your Honor, there is one question I would like to ask the Court. I've been out of my office quite a bit in the past two weeks and did not have an opportunity to have it Xeroxed.

THE COURT: You may supplement the record with a copy of them and send it back. If there is any question about it send Mr. Farmer a copy of them so if there is any question about the correctness of it he will report that.

MR. HILL: Thank you, sir.

THE COURT: Are we through with this witness?

MR. HILL: Your Honor, that's all the questions I had.

THE COURT: You may go down.

MR. FARMER: May we redirect, Your Honor?

THE COURT: All right, gentlemen, I have some other—all right, go ahead, briefly, and it better then be in response to what he asked.

MR. FARMER: All right, sir.

REDIRECT EXAMINATION OF MR. LEAPHART BY MR. FARMER.

Q. In response to the reason that Mr. Burger did not testify at the *Jackson-Deno* hearing, that as I understand that you did not want him cross examined, is that correct?

A. That's correct. And, I had, my main thrust of that *Jackson-Deno* hearing was—

THE COURT: You will have to speak up, Mr. Leaphart.

A. I'm sorry, Your Honor. Repeat your question, please.

Q. Is there any limitation on the use of his testimony at the *Jackson-Deno* hearing?

MR. HILL: Your Honor, I want to object. He's asking a question I think that we can examine the Court's opinions on that. It might change every day.

THE COURT: Well, I'm going to allow him to state his feelings. Objection overruled. What is the impression?

A. It was—in the *Jackson-Deno* hearing, of course,

you know, his testimony at the *Jackson-Deno* hearing as I understand, could not have been used in the trial of the case.

Q. Excuse me—we can't—

A. Could not have been used in the trial of the case before the jury but I didn't want the DA questioning him or subjecting him to a long cross examination where he could find out any more than he already knew.

Q. Was there anything that the DA didn't know about this case?

A. I don't know, but if there was, I certainly didn't want him to learn it. I didn't see any useful purpose in putting him up there. I felt that was another thing that I knew what type of case I had. I knew what I was up against. And, I was trying to limit his exposure in every way possible. And, I just did not feel that for the benefit of that hearing, and what I was seeking to prove, that he would have added anything to it. I think that—I made—I felt that putting him up there that somewhere down the line it was—I could possibly be harmed, or he could possibly be harmed from it.

Q. In your opinion, from trying this case, if the jury had known—if this had been tried in a place where the jury had known everything about Mr. Burger's background, everything about Mr. Honicutt's background, and everything about Mr. Stevens background, and everything about Mr. Boxwood's background, the four individuals involved, would they have given Mr. Burger a death sentence?

MR. HILL: Objection, Your Honor, I don't know what he means by everything about their background. It is obviously a hypothetical. If he's not going to put any facts into evidence about all these people's backgrounds, I don't think he should ask these questions.

THE COURT: I seriously doubt the admissibility of it. But, out of a sense of curiosity too, I'll hear it.

A. I don't think it would have made any difference. I think—I don't I say any difference—I think that he would have been harmed.

Q. No, I'm saying everything about Mr. Honicutt's background, and everything about Mr. Stevens background. The relationships between all of those parties. If all of that had been known?

A. Well, first of all, they didn't know who Honicutt was until they kidnapped him.

Q. I understand. But, if that had been known to the jury would that—

A. You mean, if they had known something distasteful about Mr. Honicutt whether or not that would have made any difference as far as the jury was concerned?

Q. Everything about the relationship—

A. No, sir, I don't think so.

Q. Is that what you told me when I talked to you the other day in your office?

A. I think it was.

Q. You didn't tell me that if they had known all about these people that no jury would give—

THE COURT: Well, I think—

A. I said that I surmised that probably the masochism involved on Honicutt's part by being as submissive as apparently he was, but I don't think that—I think that would have just added to a perverted situation.

THE COURT: All right, you may go down.

A. All right, sir.

THE COURT: Call your next witness.

MR. FARMER: Mrs. Foster.

THE WITNESS WITHDREW FROM THE STAND.

MR. LEAPHART: May I be excused, Your Honor?

THE COURT: I had better not excuse you until the hearing is over.

I hope that it will be rather brief.

THE WITNESS LEFT THE COURT ROOM.

MRS. BETTY FOSTER TOOK THE STAND, AND HAVING BEEN DULY SWORN, TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION OF MRS. FOSTER BY MR. FARMER:

THE CLERK: Mrs. Foster, come around and have a seat in the witness stand, please ma'am, and after you have a seat state your name and occupation and spell your last name for the record please ma'am.

A. My name is Betty Foster, I'm an Assistant Manager of an Apartment Complex in Baton Rouge. My last name is spelled F O S T E R.

Q. Mrs. Foster, are you related to Christopher Burger?

A. Yes, sir, he's my son.

Q. And, would you—I call your attention back to the time he was charged in Jesup, Georgia and was tried in that County. Did you go and appear at that first trial of Mr. Burger?

A. Yes, sir, I did.

Q. Were you contacted by anyone representing him before that trial?

A. No, sir.

Q. And, how did you find out about the trial?

A. My youngest daughter called her father at Christmas time, December of '77 to wish him a Merry Christmas. And, her step grandmother told her. Her father was not at home. He was Christmas shopping. So she called her step grandmother and she told her about it.

Q. And, is that the first contact you had with—when you appeared there, was that the first contact you had with Mr. Leaphart or anybody from his office?

A. Yes, sir.

Q. Had you ever known him before that time?

A. No, sir.

Q. At the time that you arrived there did you have a conversation with him?

A. Yes, sir. I went to the jail first. And, we had two days notice before the first trial was supposed to have been. I went to the jail and was told it had been postponed. I found out who his attorney was and went to see him.

Q. Did he tell you anything about the nature or what type of trial it was going to be, or what type of evidence would be able to be admitted in evidence?

A. No.

Q. What did he tell you?

A. He just told me that Chris was being charged with murder. There was a possibility that there would be a death penalty. And, that court had been postponed, he would let me know when it was to convene again. I found out very little at this time.

Q. All right, and was there any other conversation about Chris's background or his friends, or anything at that time?

A. No, sir.

Q. Did he inquire as to any potential witnesses, or anything about Chris?

A. No, sir.

Q. Then did you come down for the first trial?

A. Yes, sir.

Q. And, what opportunity and how long did you talk to him before the first trial?

A. I saw him for possibly a half hour prior to going to court.

Q. All right, and did he at that time tell you anything about the type of evidence that could be presented, or ask you anything about Chris's background?

A. He asked me if Chris had ever had any psychological checking, or anything, and I advised him that he had as a child. And, he asked me to try and through Chris's power of attorney get that information for him from the State of Indiana from Florida where I had taken it.

Q. Did you get that information?

A. Yes, sir. I did.

Q. And, did the psychologist ever talk to you? Did Dr. O'Hare ever talk to you, the psychologist that Mr. Burger's attorney Mr. Leaphart had hired, did he ever talk to you?

A. No, sir. I never saw him until during the first trial when he testified.

Q. A little bit louder, please.

A. I never saw him prior to the trial at the time that he testified at the trial.

Q. Did he ask you anything about Mr. Burger's background at all?

A. No, sir.

Q. Did you hear, did you hear the trial, were you present there for the trial?

A. Yes, sir.

Q. And, after he was found guilty at the first trial, did Mr. Leaphart tell you anything about what type proceeding could take place to determine what punishment he got?

A. No, sir, not really.

Q. All right. Do you have a friend, or do you know a person who is an attorney in Indiana who knows Chris?

A. Yes, sir, there is a gentleman who at one time was Chris's big brother, working—

Q. And, explain to me what a big brother is?

A. There is an organization in Indiana where interested men volunteer their time to be involved with children who for whatever reasons don't have a father-son relationship, or a big brother. And, they spend time with the child, taking him to baseball games, or whatever, to give them a sense of a father-big brother relationship.

Q. And, what is this individual's name?

A. Mr. Richard Halley.

Q. And, is Mr. Halley—what profession is he in?

A. He is now an attorney. At the time he was involved with Chris as a big brother he was in law school. He has since been practicing in Indiana.

Q. At the time that he—that Chris was involved in this case, was he practicing law at that time?

A. Yes.

Q. And, did you contact him about Chris's problem?

A. Yes, I did. He was one of the first people that I called because he was a friend of the family. And, was always there when Chris or I needed him. I asked him

if there was anything he could do. And, I told him I didn't have the money to help him in any way. And, he offered at his own expense to come to Georgia and assist in any way he could, not necessarily actively involved, but kind of in the background, helping with advice, or whatever. And, he offered to come at his own expense.

Q. Did he convey this to Mr. Leaphart?

A. Yes, sir, they talked by phone several times.

Q. And, did you later find out why he didn't come?

A. Yes, sir. I arrived in Jesup the day before Chris's trial. And, Richey wasn't there. So, I called him at home, and he was there. And, I asked him "Richey, I thought you were coming, why aren't you here?" And, he said "I spoke to Mr. Leaphart—

MR. HILL: Your Honor, hearsay.

THE COURT: How does this get around the hearsay rule?

MR. FARMER: Your Honor, I think that—I think that—

THE COURT: I don't think it does. You cannot get it under any exception I know.

MR. FARMER: If I might do this, if we might use it to establish why she took what action she took. That's the—

THE COURT: —the only tenuous way. I think that's going too far.

MR. FARMER: All right.

THE COURT: All right, I sustain his objection.

MR. FARMER: I would like to make an offer of proof that if—

THE COURT: I'll allow you to do it.

MR. FARMER: If it were admitted to show what action she took, it would show that he was told because that he was a black person, that he should not come and that he should not be there to participate in the trial, or be there to assist in any way in legal matters. And, that she had relied on him as being a person that she had

confidence in to help. And, that—that would be the offer of proof. Now, tell me about the relationship of—between in addition to the big brother association, is there any—there is no kind of relationship between you and Mr. Halley, was there, any personal relationship?

A. No, sir.

THE COURT: Don't lead the witness.

MR. HILL: Objection, leading question.

MR. FARMER: All right, sir.

Q. Was there any kind of personal relationship? I mean is he any kind of spouse or spousal relationship?

A. Oh, no, sir. I knew him only through big brother.

Q. Now, did Mr. Leaphart at that time tell you that other people could testify as to mitigating circumstances about Chris?

A. No, sir.

MR. HILL: I'm going to object, Your Honor, to leading questions.

THE COURT: Don't lead the witness.

Q. Did he tell you anything about what could happen in the penalty phase of the trial?

A. No, sir.

Q. Did you know anything about what could happen after he had been found guilty, what evidence the jury could hear?

A. No, I didn't.

Q. Did anybody ask you about any possible witnesses —getting any witnesses to testify?

A. No, sir.

Q. After the first trial, did anybody ask you about witnesses for the second trial?

A. No, sir.

Q. Did anybody explain to you what could be put into evidence on his retrial on the punishment phase?

A. No, sir.

Q. Did you know?

A. No.

Q. Did you have any idea until we contacted you and told you about these proceedings?

A. No, I did not.

Q. Is there evidence about Chris's background that could—that could—that would affect a jury in determining whether he was—

MR. HILL: Objection, Your Honor. Calls for an opinion and I don't think the witness is qualified.

THE COURT: Objection sustained.

Q. Tell me if you will—if you will tell me a little of your background. When were you married, and who were you married to?

A. I was married to Chris's father. I was 14. He was 16.

Q. And, where were you when you married?

A. Indianapolis, Indiana.

Q. And, how many children resulted from that marriage?

A. Four.

Q. And, which in order of birth, which child is Chris?

A. Chris is the second.

Q. And, how long did y'all stay together as man and wife during that—the first time you were married?

A. 13 years.

Q. And, when was Chris born in that period of time?

A. During our fourth year of marriage.

Q. —And, what happened to Chris after that? After he was born, tell me what his life was about back then.

A. Well, Chris was kind of like a forgotten child. The oldest daughter was three years older than him. My last two children, there was fifteen months difference between Chris and his sister and his youngest sister and his brother. So, the baby got all the attention, and the little girl was beautiful long blonde hair with curls and she got a lot of attention. The oldest one got more privileges, but of course she got more responsibility. Chris got very little of anything, our time, our attention. He was just kind of looked over.

Q. Was there problems between the relationship of you and your first husband?

A. Oh, yes.

Q. That type of problems was this and why did they affect Chris?

A. Well, for instance the night Chris was born I had to have a neighbor take me to the hospital. His father came to see him and he had to leave immediately and I asked him why. He said he had trouble with the car and he had left it running—

THE COUT: Well, what is the relevance of this?

MR. FARMER: Your Honor—

THE COURT: I don't want to hear about that. I'm not going to hear about it.

MR. FARMER: Your Honor, what we are trying to show—

THE COURT: I know what you are trying to show.

Ask what she would have testified to if she had been there.

What would she have said, good or bad.

MR. FARMER: All right, sir.

THE COURT: That made him the person that he is.

MR. FARMER: All right.

Q. Tell me what you would have told—what you think would be important for the jury to hear about Chris's background if you had testified at the trial? If you would go ahead—

THE COURT: Did he win any honors in school?

A. Yes, sir, he won some honors for art. He has a fantastic artistic ability.

THE COURT: Tell me about that.

A. He entered several contests and drew posters, and so on.

THE COURT: All right, what else would you say?

A. Honors for that. He was in track.

THE COURT: What else?

A. And—

THE COURT: President of the Sunday School class?

A. No, sir. He attended Sunday School.

THE COURT: What kind of church?

A. Baptist.

THE COURT: What else.

A. He was given—

THE COURT: Scouts, or you said he was in some big brother type organization, is that something similar to scouts?

A. Not exactly.

THE COURT: I think you explained it.

A. He was in summer camp several times and won ribbons for swimming and archery.

THE COURT: All right, what else would you have—

A. Things of this nature.

THE COURT: —said about him that made him a worthwhile or a good human being?

A. Chris is a very warm gentle, loving person. He is a follower.

THE COURT: Okay. What else would you say?

A. I would say I wish I had taken more time with him. I wish I had guided him better. He was switched from his father to me back and forth, back and forth. He never felt like he belonged anywhere.

THE COURT: Did he graduate from high school?

A. No, sir.

THE COURT: How far did he go in school?

A. He completed the 9th grade. He just recently got his GED.

Q. That's been since he was in prison that he got his GED?

A. Yes, sir.

THE COURT: What kind of trouble was he in?

A. Things like playing hookey, a whole bunch of them would skip school.

THE COURT: Any shoplifting, or fighting, or anything of that nature?

A. No fighting. He shoplifted one time, a candy bar.

THE COURT: That was the only bad thing that you know about him?

A. Yes, sir.

THE COURT: Okay.

Q. Tell me how he was—you said he was shifted from house to house, explain to me what about his background about that shifting, and about the influence of the person that you were living with later, not his father, but the man you were living with later upon his life?

A. Well, I remarried and his stepfather did not want him, and he made it quite plain to Chris and I that he wasn't welcome and he didn't want the responsibility of Chris. There was nothing but a stone in this path. And, it was—I'm going to throw him out on the street. So, I'd send him back to his father. His father didn't want him. So, I get him back. He never knew from day to day where he was going to live, where he was going to sleep that night. His stepfather got him involved with marijuana, and that was the whole point of his life, where the next bag was coming from, or the next bottle of beer. And, this was the kind of influence that he had. And, I was so busy trying to keep this marriage together that I let it cost my son's security. He just—he had no sense of his own self worth.

Q. You mentioned earlier that he was a follower. Would you explain that?

A. When Chris, whether it was a sport he was involved in, or trouble, he always was with a group. I did this because they wanted me to. He did not go out singularly by himself and get himself in trouble. He wanted to be accepted by the group. And, he—it meant that he went with them, hook school, or whatever, that's what he did, for acceptance.

Q. And, how was he treated by your—by his stepfather, in what ways was he treated and disciplined?

A. He had two stepfathers. The first one beat me and Chris when Chris tried to help me.

Q. And, how do you mean that, he tried to help you?

A. He would see him beating me and he would try to step in between us and fight him, and he took a beating too. And, not just one, but many times.

Q. And, what age was he when this was—

A. 11.

Q. And, you moved from Indiana to Florida, is that right?

A. Yes.

Q. And, Chris didn't come?

A. No.

Q. Did he later come?

A. Yes. He ran away from his father's and he hitchhiked from Indiana to Florida.

Q. And, why did he run away?

A. Because it was unbearable there. He was physically mistreated, physically and emotionally.

Q. And, how did he get to you and what was his state when he got there?

A. He got to me by hitchhiking. He had no money, he had a knapsack with a few belongings in it. He had a new pair of shoes. And, it was in winter time. And, to get to me he sold those shoes for $2.45 to get him something to eat. When I picked him up in Tampa he was in his stocking feet, and it was very, very cold.

Q. How was he treated by the man you were living with at the time?

A. The first night he arrived he told us both I don't want him here, he doesn't belong to me. He's got no place here. Get him out. Where is he going to go? Where he came from. I don't care. Back on the street. This is what he heard the night he arrived.

Q. Did he get in trouble in Tampa?

A. Yes, he did.

Q. What happened as a result of that?

A. He was involved in an auto accident in our car. And, I was gone that day. When I got home a State Trooper was waiting for me. And, he said he had Chris

at the juvenile detention home, that I could come and get him. Send him gack to Indiana. I didn't care. I just told him I didn't want any part of him. He could keep him. Send him back to Indiana. I didn't care. I just didn't want any part of him.

Q. What happened then?

A. The authorities returned him to Indiana to his father. And, his father refused to take him. So, the Indiana authorities met the plane, and he went from the airport to the juvenile detention home there.

Q. And, what happened then?

A. He was kept there a few weeks. He went to Court. The judge agreed to release him in his father's custody with the understanding he was on probation would have to go back to Court at a later time. His father agreed to that. The judge—when they then left the court he wouldn't let him go home with him.

Q. His father wouldn't?

A. No, sir.

THE COURT: Are you speaking of personal knowledge or hearsay?

A. I know this.

THE COURT: Were you there or—

A. No, but I—

THE COURT: Or were you in Tampa?

A. I was in Tampa, but his father told me this, because I called him to find out how Chris was.

THE COURT: I'm not—develop another area. This is all hearsay.

MR. FARMER: Your Honor, we would like to admit this also for the purpose—

THE COURT: No. I—Mr. Farmer, we have certain issues, legal issues that we have to judge, here. Regardless of how regretful everything is, I cannot try it. We're here really in an appellate procedure. And, I know you are saying these things would have been compelling to a jury. But, if they were hearsay before me they would obviously have been hearsay before that jury.

MR. FARMER: Yes, your Honor. I would like to make a motion at this time that this testimony be considered in connection with affidavits that we have. We have approximately seven affidavits from people in Indiana to allow us—that her testimony be in support of a motion to allow us to take the depositions of these individuals who can testify not from hearsay. And, that what we are trying to show is that the evidence did exist, and does exist. And, we have affidavits to support the motion for the depositions, and affidavits to support the evidence that could have been presented to the jury. And, we want the court to consider this testimony and these affidavits for two purposes. And, to let us take the depositions and bring the evidence to the Court. And, to—what evidence could have been presented to a jury in his trial as mitigating circumstances.

THE COURT: Well, obviously, if one searches every —well, I will withdraw the comment.

MR. HILL: Your Honor, I want to oppose his motion. I think the Court has already ruled in its order which set this evidentiary hearing down that it was not going to allow depositions.

THE COURT: That's right.

MR. HILL: And, we were going to limit the issues to those here—

THE COURT: I'm not going to accept it, Mr. Farmer. Is there anything else from this witness?

MR. FARMER: Yes, Your Honor. I—before I complete with this witness I would, if it is the Court's pleasure, I would like to ask that these affidavits be considered under 28 U.S.C. 2246 as direct testimony on this particular issue. And, I know the Court can't rule on—

THE COURT: Let me—file them. And, I will make a determination on that issue whether I'll need to make any other finding on them.

MR. HILL: For the record, Your Honor, I want to object to that admission into evidence.

THE COURT: Well, he is going to file them. I do not know whether they will be admitted into evidence. But, since they are here, I'll make a determination.

All right, let's proceed, Mr. Farmer.

MR. FARMER: Yes, Your Honor. Mr. Nercy will take care of the filing. There is a brief in support of admission of these.

THE COURT: Okay. Is there anything else of this witness?

MR. FARMER: Yes, sir.

MR. HILL: Your Honor, I have not been served with a copy of that.

THE COURT: I realize that. They will give them to you. I won't even physically look at them until I hear from you and him. And, you may do that in a response brief. All right.

Q. What happened to Chris after the time that he returned from Tampa, Florida to Indianapolis, Indiana?

THE COURT: Well, she's already said that she was in Tampa. And, I have told you not to go into that.

Q. Do you know of your own personal knowledge what he did after that time? Do you know what he did after that time, what Chris did?

A. Yes, I know he joined the Army.

Q. And, his age at the time that this particular act happened, do you know his age at the time this act happened? At the time the crime that we are here discussing?

A. 17.

Q. And, were you in any way consulted about whether Chris could testify before the jury or not?

A. No, sir.

Q. Were you given any reason to believe that you could testify before the jury or not?

A. No, sir.

Q. Did you since the time that Chris has joined the Army, have you remarried again?

A. Yes, I have.

Q. And, who is your present husband?

A. Marian Foster Senior.

Q. And, did Mr. Foster attend the trial with you on the second occasion?

A. Yes, sir.

Q. At the time that he attended the trial with you on the second occasion did you and Mr. Foster have an opportunity to talk with the family of the person who had been killed, Mr. Honicutt's family?

A. Yes, sir, I did.

MR. HILL: Your Honor, I want to pose an objection. I don't see how it is relevant, either.

MR. FARMER: Your Honor, is the Court saying—

THE COURT: Well, you asked did she talk to him. She answered yes. Now, I suppose that's a departure for something else.

MR. FARMER: Yes.

THE COURT: But, I don't see how that is relevant.

MR. FARMER: Your Honor, its

THE COURT: What is she going to say?

MR. FARMER: Evidence that the family of the victim could have presented. I think that we're talking about two things that this witness can testify to. I think this witness can testify as to what she could present as evidence.

THE COURT: Gentlemen, I'm going to terminate this hearing. All right, Marshal? We'll be back in ten minutes to take up something else.

NOTE: RECESS.

END OF PROCEEDINGS FOR THE DAY.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

CV280-114

CHRISTOPHER A. BURGER, PETITIONER

vs.

WALTER B. ZANT, Warden, Georgia Diagnostic and Classification Center, RESPONDENT

ORDER

Before the Court is a petition for writ of habeas corpus for review of the judgment of the Superior Court of Wayne County, Georgia, and the conviction and sentence of death imposed upon the petitioner. Numerous arguments have been raised with respect to both the finding of guilt and imposition of sentence. For reasons developed below, the Court finds merit only in petitioner's claim that certain defective charges at the sentencing phase may have denied the jury proper guidance in its deliberations. Petitioner's sentence will therefore be vacated and his case remanded for further proceedings.

Background

Petitioner Christopher A. Burger was tried before a Superior Court jury in Jesup, Wayne County, Georgia, for the murder of Roger E Honeycutt, a soldier who, like Mr. Burger, was stationed at Fort Stewart, Georgia. Trial was held on January 23-24, 1978, before the Hon-

orable Robert L. Scoggin. Petitioner was found guilty, and after a separate sentencing proceeding, the death penalty was imposed. The Supreme Court of Georgia affirmed the finding of guilt by an Order of September 5, 1978. However, the Court also concluded that jury charges with respect to the sentencing phase of the proceedings were defective, and accordingly, the case was remanded for retrial with respect to sentence only. *Burger v. State*, 242 Ga. 28 (1978).

A second trial limited to the question of sentence was held before Judge Scoggin on July 16, 1979, with the death penalty again imposed by the Court on July 19, 1979, pursuant to the second jury's determination. On March 14, 1980, the Supreme Court of Georgia affirmed petitioner's sentence based upon the view that one aggravating circumstance had been properly charged on and found by the jury. Two other aggravating circumstances were invalidated by the Court in light of certain defective charges by the trial judge. *Burger v. State*, 245 Ga. 458 (1980).

Thereafter, petitioner filed for writ of certiorari in the United States Supreme Court. Petition was denied on June 2, 1980. Motion for reconsideration was similarly denied on August 11, 1980. On September 16, 1980, the Superior Court of Wayne County, Georgia, set October 2, 1980, as the date of execution. On October 1, 1980, petition for writ of habeas corpus was filed in the Superior Court of Butts County, Georgia. This action was also dismissed on October 1, 1980. Application for certificate of probable cause to appeal and motion for stay of execution were denied by the Supreme Court of Georgia on October 1, 1980, as well.[1]

The present action was filed in this Court on October 2, 1980. At that time the Court ordered a stay of execution to permit consideration of the various issues raised in the petition. Subsequently, the Court has entertained

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[1] Respondent stipulates that exhaustion of state remedies is not an issue in this case.

oral argument from the parties, first at a hearing conducted December 12, 1980, and more recently at another proceeding held on March 7, 1981. At that time, the Court received evidence relating particularly to claims of ineffective assistance of counsel. Certain written materials have also been received and examined by the Court. The results of this analysis are developed below.

Facts

Christopher Burger was indicted along with Thomas D. Stevens, another soldier at Fort Stewart, for the murder of Roger E. Honeycutt.[2] Evidence developed at trial tended to show that, on September 4, 1977, Burger and Stevens were drinking at a club on post. After exhausting their resources, they decided to raise more money by robbing a taxicab. They then procured a butcher knife and a sharpening tool from the mess hall for use in the robbery and called a cab. They also spoke to a friend and fellow soldier James Botsford. Private Botsford had just arrived at the airport in Savannah after an emergency trip. Petitioner and Stevens agreed to come to the Savannah Airport and bring him back to the base.

Shortly thereafter, at around 10:00 P.M., the victim Honeycutt, who was driving at night to supplement his military income, picked up petitioner and Stevens at Fort Stewart. During the trip to the airport, petitioner and Stevens accosted Private Honeycutt with their weapons, forced him to stop the cab, and took sixteen dollars from him. Honeycutt was then placed in the back seat of the taxi, and the trip resumed with petitioner driving.

Petitioner and his confederate continued their search for money in the cab as they drove on to the airport. Stevens moved to the back seat of the vehicle. Private Honeycutt was then forced to disrobe while Stevens searched each article of clothing and then discarded it by

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[2] Mr. Stevens was tried separately, convicted, and also sentenced to death. See *Stevens v. State*, 242 Ga. 34 (1978).

throwing it out the window of the car. After Honeycutt had been completely disrobed and no additional money discovered, Stevens forced him to paritcipate in acts of oral and anal sodomy. Subsequently, the victim was placed in the trunk of the cab, still nude, and with his hands tied behind his back.

Petitioner and Stevens then continued to the airport, and picked up Private Botsford. During the drive back to Fort Stewart, they explained what they had done to Botsford in some detail. When Botsford expressed incredulity, they confirmed their story by exchanging brief remarks with Private Honeycutt who could hear and be heard from within the trunk. After some debate, Botsford induced his friends to promise that Private Honeycutt would not be harmed, and, in turn, agreed not to notify the authorities. Later, Private Botsford was dropped off at Fort Stewart. Petitioner and Stevens drove on to Jesup, and finally to a nearby "borrow pit" which was filled with water. After they had wiped their fingerprints from the car and removing a C.B. radio, Mr. Burger raised the trunk lid and asked Private Honeycutt if he was all right. Honeycutt stated that he was. After closing the trunk, Mr. Burger started the car and drove it into the pond, jumping out as it entered the water. The victim was still alive at this time. Thus the autopsy showed drowning as the cause of death.

Petitioner and Stevens then returned to the army base. The next day they contacted Botsford and assured him that the victim had been released unharmed. Private Botsford in turn told them that he had not been to the police. However, on September 12, 1977, Botsford contacted the state patrol and authorities on post after he learned that a local taxi driver had been missing for several days. Shortly thereafter, petitioner and Stevens were picked up by military police. After briefly denying all knowledge of the crime, petitioner made a complete confession and described the incident in detail. He also took the authorities to the pit and pointed out where Private

Honeycutt's body could be found. This confession and Private Botsford's testimony were primary sources of evidence in the subsequent trial. Mr. Burger did not testify.

Issues Presented

Petitioner has alleged approximately fifteen grounds for reversal of his conviction or sentence or both.[3] Certain of these arguments are so plainly inapplicable to the present case as to demand no discussion here. Many points do however merit some review. First, with respect to the guilt-innocence phase of trial, the Court will consider petitioner's claims of constitutional error based upon (1) use of petitioner's confession which was allegedly obtained under circumstances which render it involuntary and, hence, inadmissible; (2) failure to properly advise petitioner of his *Miranda* right to appointed counsel which is also alleged to vitiate the confession; and, (3) certain language in the trial court's charge which allegedly shifted the burden of proof with respect to criminal intent to the petitioner. The Court will next consider other claims of error which impact on both the guilt and sentencing phases of trial: (1) the introduction into evidence in all proceedings of allegedly inadmissible hearsay statements made by Stevens; and, (2) generally ineffective assistance of counsel as allegedly manifested in virtually all aspects of the preparation and conduct of petitioner's defense. Finally, the Court will review two arguments which relate only to sentencing proceedings against Mr. Burger: (1) the alleged failure of the Georgia Supreme Court to apply a constitutional definition of one aggravating circumstance in its review of the death sentence; and (2) failure of the trial court to instruct fully on the remaining aggravating circumstances.

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[3] Petitioner's motion to permit amendment is thus granted. Arguments raised thereby, which primarily concern *Miranda* warnings and admission of statements by Stevens, are considered and rejected below.

Analysis

(1)

Mr. Burger contends first that his confession was obtained "through the use of psychological coercion, tricks and ploys. Petitioner was not mentally competent to understand his right against self-incrimination, nor was he competent to waive that right." In support of these claims, petitioner relies *inter alia* upon evidence of his sub-normal intelligence, the length and conditions of interrogation, and petitioner's alleged intoxication at the time of questioning. Petitioner also refers to certain defects in the *Miranda* warning given by Fort Stewart authorities, which will be considered separately.

At trial, a hearing into the circumstances of petitioner's confession was conducted out of the jury's presence. *Jackson v. Denno*, 378 U.S. 368 (1963). At this *Jackson v. Denno* hearing, testimony was received from investigating officers of the Jesup Police Department and the Fort Stewart Criminal Investigation Division (CID), as well as from an expert employed by the defense to perform various psychological tests on Mr. Burger. The testimony of the various police officers indicated that petitioner was picked up by military authorities early in the evening of September 12th, after Private Botsford had gone to these authorities with his information. Questioning began at about 9:20 P.M. At 9:25 petitioner was read his *Miranda* rights and signed a waiver permitting the interview to continue without counsel. After initially denying any knowledge of the crime, Mr. Burger began detailing the entire incident to investigators. At about 11:10 P.M. he agreed to show the military police where the cab was, because he could not verbally pinpoint the location. At 11:25 P.M., Mr. Burger and military authorities left Fort Stewart to go to the pond. They reached this pit at 12:34 A.M., remained there about thirty minutes, and then returned to Fort Stewart, arriving back at the CID office around 1:54 A.M. The

investigating officer then typed out a four-page confession, which required about an hour and a quarter. The confession was signed around 4:00 A.M., after petitioner had sworn to its accuracy.

It thus appears that petitioner was in custody for perhaps nine hours before he signed the confession. It also appears that he was in contact with no one except law officers during this period. However, the uncontradicted testimony of these officers indicated that petitioner was "alert and coherent" at all times. T. 174. Furthermore, he appeared to understand his rights, but nonetheless preferred to proceed without an attorney. T. 170. There was no reason suggested for believing that he was under the influence of any drug. T. 175. Nor did any testimony suggest that "tricks or ploys" had been used to elicit the statement.

Testimony from petitioner's psychologist did not call these facts into serious question. This expert stated that Mr. Burger does have limited intellectual capacities. Test results indicated an I.Q. of 82 as well as some possible brain damage. However, it was pointed out that these limitations had not prevented petitioner from successfully completing two courses of military training and otherwise functioning adequately in daily life. The psychologist also testified that petitioner's limitations were not so profound as to put him "beyond the concept of understanding right from wrong." T. 250. Furthermore, the psychologist found no reason to believe that the confession had been improperly obtained, or indeed that "tricks and ploys" would have been needed to elicit the statement:

> I think he would enjoy the idea, frankly. This would be a great opportunity to display his psycho-pathological behavior. He'd probably shout in the wind as much as he could of all the things he might have done.
>
> T. 250.

It appears then that Mr. Burger is a man of limited capacities. However, he was not incapable of normal functioning in his military role. Nor was he beyond understanding the nature and significance of his crime or his confession. It also appears that he was questioned at some length but not against his will or while under the influence of drugs or otherwise incompetent. Considering the "totality of these circumstances" the trial court found that the confession had not been improperly obtained. T. 268. It was thus submitted to the jury for a second determination, which was apparently also unfavorable to the defendant. The present petition suggests no basis for disturbing this determination, and this Court sees none. Therefore, Mr. Burger is entitled to no relief on this point. *LaVallee v. Delle Rose*, 410 U.S. 690 (1972); *Howard v. Maggio*, 540 F.2d 1280, 1282 (5th Cir. 1976); *Branch v. Estelle*, 631 F.2d 1229, 1233 (5th Cir. 1980).

Second, petitioner contends that his confession should have been excluded as having been obtained pursuant to an improper *Miranda* warning. This point was also argued at length in the trial court. *See, e.g.*, T. 197-98. Here, as at trial, constitutional error is alleged to have developed out of the unusual circumstances of petitioner's arrest. It is undisputed that petitioner received the standard *Miranda* warnings accorded all military suspects at the time of his first interrogation. This warning informs the suspect that he may have the services of a military attorney at no cost, or, if he so chooses, that he may retain private counsel at his own expense. It is similarly undisputed that, when petitioner was turned over to the Jesup police, he was given a standard civilian warning that a private attorney would be provided for him if he were indigent and so-requested. T. 200. Error is, however, claimed in that military police failed to inform petitioner of his right to free private counsel as soon as they became aware that the homicide might have been committed off-post and therefore, been subject to civilian jurisdiction.

The adequacy of a *Miranda* warning must be viewed in light of the purpose it is intended to serve. There can be little doubt that this purpose is to provide persons in custody under suspicion with legal advice which might enable them to better know and protect their rights and interests. *Miranda v. Arizona*, 384 U.S. 436, 479 (1965). In the present case, petitioner was afforded access to the only counsel military authorities had power to provide. Similarly, petitioner was accorded the opportunity to obtain civilian counsel by civilian authorities. At no point was Mr. Burger questioned in circumstances where he could not have obtained legal assistance without cost had he so-desired. Furthermore, there is no reason whatever to believe that military counsel would have been any less skillful or diligent than a civilian attorney in protecting petitioner's interests during military interrogation. Petitioner's argument would apparently require that a suspect be offered the advice of counsel who could represent the accused in all circumstances which might develop from the investigation. The Court knows of no authority which would support such a requirement. The Court further concludes that the purposes of *Miranda* are adequately served when a suspect is given access to legal assistance competent to assist him in the questioning then in progress. Petitioner was at all times afforded such protection. Thus, the present argument is without merit.

Third, petitioner contends that the trial court's charges on the issue of intent impermissibly shifted the burden of proof with respect to this essential element of the crime charged. The language thus questioned is as follows:

> Now, by definition, ladies and gentlemen, in our State a crime is a violation of a statute of this State in which there shall be a union of joint operation of act, or omission to act, and intention, or criminal negligence. I give you certain presumptions of law that are applicable to this case.

A presumption is a conclusion which the law draws from given facts. Each of these presumptions are rebuttable. That is, they are subject to being overcome by evidence to the contrary.

I charge you now the presumptions that are rebuttable. Every person is presumed to be of sound mind and discretion. The acts of a person of sound mind and discretion are presumed to be the products of the person's will. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts. A person will not be presumed to act with criminal intention, but the jury may find such intention upon consideration of the words, conduct, demeanor, motive and all other circumstances connected with the act for which they (sic) accused is prosecuted.

A specific intent to commit the crime charged in this indictment is an essential element that the State must prove beyond a reasonable doubt. Intent is always a question for the jury, and is ordinarily ascertained by acts and conduct. Intent may be shown in many ways, provided the jury finds that it existed from the evidence produced before you. It may be inferred from the proven circumstances, or by acts and conduct, or it may be presumed when it is the natural and necessary consequences of the act.

T. 409-10.

This charge, of course, employs language which has been the subject of lengthy judicial consideration, and, in some contexts, of very severe criticism. *United States v. Sutton*, Slip No. 79-5681, Fifth Circuit, decided February 2, 1981; *United States v. Chiantese*, 560 F.2d 1244 (5th Cir. 1977). However, it is clear from *Chiantese* as well as other decisions that no *per se* rule exists against charging the truism that a person is normally presumed

to intend the natural and probable consequences of his actions. 560 F.2d, at 1255-56. Thus, it is necessary to begin any analysis by determining the type of presumption which is involved. Only then is it possible to ascertain the proper standard for constitutional analysis. *Sandstrom v. Montana*, 442 U.S. 510, 514 (1979).

It is apparent from examination of the charge at issue that it creates no mandatory presumption. Quite the opposite, the trial court was careful to state and restate the principle that there could be no presumption of criminal intent and that at all times the state had the burden of proving such intent beyond a reasonable doubt. The language in question thus appears to create no more than a permissive inference which the jury was left free to apply or reject as it saw fit in view of all the evidence in the case. Moreover, this interpretation is in accord with analysis of the legal significance of the charge by the Georgia Supreme Court. *See Skrine v. State*, 244 Ga. 520 (1979).[4]

It is therefore appropriate to analyze the present charge under *Ulster County Court v. Allen*, 442 U.S. 140 (1979). In *Ulster County*, the court defined a permissive inference as one which "allows—but does not require—the trier of fact to infer the elemental fact from proof by the prosecutor of the basic one and that places no burden of any kind on the defendant." 442 U.S., at 157. The Court then described the test for a constitutional attack on such a presumption:

> When reviewing this type of device the Court has required the party challenging it to demonstrate its invalidity as applied to him. Because this permissive presumption leaves the trier of fact free to credit

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[4] Even though the Georgia Supreme Court is the final authority on questions of state law, this Court must still ask how a jury might have interpreted the trial court's charge. Here, however, there is no reason to conclude that the jury's interpretation could have departed from that of the Georgia court. *See Sandstrom, supra*, at p. 516.

> or reject the inference and does not shift the burden of proof, it affects the application of the "beyond a reasonable doubt" standard only if, under the facts of the case, there is no rational way the trier could make the connection permitted by the inference. For only in that situation, is there any risk that an explanation of the permissible inference to a jury, or its use by a jury, has caused the presumptively rational factfinder to make an erroneous factual determination.
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> 442 U.S., at 157 (citations omitted).

The proper question thus becomes whether there was a rational basis under which the jury might infer criminal intent from the defendant's actions with respect to the murder. The evidence, of course, indicated that Mr. Burger raised the trunk lid of the victim's taxicab and specifically asked him if he were all right. Mr. Burger himself then drove the vehicle directly into the pit where it submerged, drowning Private Honeycutt. There can be no real doubt as to whether there exists a rational basis by which the jury could conclude that this course of conduct was intended by petitioner. Furthermore, these circumstances as well as other evidence in the record clearly provide ample basis to support a conviction independent of any presumption. 442 U.S., at 160. Nor does it appear that any problem would be created by replacement of the rational relationship test by a more stringent "reasonable doubt" standard. See *Barnes v. United States*, 412 U.S. 837, 842-43 (1978). Here, it seems entirely clear that the facts upon which the presumption is founded are sufficient to support an inference of intent to kill beyond a reasonable doubt. See *Ulster County, supra*, at 166.

This analysis is supported by review of Fifth Circuit cases considering jury instructions which employ this "natural consequences" language. As was indicated above, these cases make clear that there is no *per se* rule

against such an instruction. The real concern is not the phrase "a person is presumed to intend the natural consequences of his voluntary actions." In fact, the Court has specifically approved pattern charges which use these words. *Chiantese, supra*, at p. 1255-56. Error is introduced only when this language is coupled with other phraseology which appears to place some burden of producing evidence on the accused. Thus, the Court emphatically rejects the following language:

> It is reasonable to infer that a person ordinarily intends the natural and probable consequences of acts knowingly done or knowingly omitted. *So unless the contrary appears from the evidence*, the jury may draw the inference. . . .
>
> 560 F.2d., at 1249. See also *Mann v. United States*, 319 F.2d 404 (5th Cir. 1963) (emphasis added).

When one examines language of the charges in question, it is apparent that no such burden shifting can be inferred. Here the trial court specifically charged that the accused "enters upon the trial of this case with the presumption of innocence and that presumption remains with him throughout the trial and until and unless the State . . . convince(s) your minds beyond a reasonable doubt as to his guilt." T. 404. The Court charged further that a "person will not be presumed to act with criminal intention." T. 409. With reference to the "natural consequences" instruction, the Court specifically labeled the presumption "rebuttable." T. 410. Furthermore, immediately after stating it, the Court again indicated that "a person will not be presumed to act with criminal intention." T. 411. Such a statement hardly repeats the error criticized in *Chiantese* and related cases. Similarly, the trial court's concluding reference to "natural consequences" is couched language directly reminding the jury that intent is "an essential element that the state must prove beyond a reasonable doubt," based upon the jury's evaluation of all the evidence before it.

In sum, the trial court's charge does not appear to create an real possibility of impermissible burden-shifting. The situation condemned in *Chiantese*, *Mann*, and *Sandstrom* is simply not present here. Instead, the challenged instructions specifically remind the jury that the burden of proof remains at all times on the state. These instructions create only a permissible inference which the jury is left free to accept or reject in accord with its view of the evidence. Furthermore, it appears that this evidence amply supports the inference whether evaluated under a "rational basis" or a "reasonable doubt" test. Accordingly, petitioner's claim of error is without merit.

(2)

Petitioner alleges two other constitutional violations which would impart on both phases of trial. Petitioner contends first that he was denied due process of law by admission of certain hearsay statements by Stevens into evidence. Reference is thus directed primarily to the testimony of Private Botsford. In this testimony, Botsford recounted *inter alia* various remarks made directly to him by Stevens while the petitioner was also present in the taxicab. These statements included references to the armed robbery which the parties had planned and carried out in concert. There was also considerable discussion of the sodomizing of Honeycutt which was apparently Stevens' idea, though petitioner obviously aided this crime by driving the taxi during its commission.

These statements by Stevens were admitted into evidence over objection by counsel. The trial court's ruling was based upon several provisions of state law. In particular, the court appeared to find the disputed remarks admissible as the statements of a co-conspirator during the course of the crime. T. 98. The court apparently considered this argument particularly compelling in view of the fact that petitioner was physically present when Stevens spoke, and testimony that he generally joined in

or approved Stevens' statements as they were made. T. 92, 94. Stevens' statements with reference to the sodomizing of Honeycutt were also admitted as showing "res gestae", or the petitioner's motive and course of conduct with respect to the eventual murder. T. 101.

It is claimed, of course, that these statements were inadmissible hearsay under state law and that the trial court's decision to admit was incompatible with fundamental fairness. However, it does not appear that admission of these remarks was in fact violative of any state rules of evidence. With respect to the evidence of sodomy, in particular, it appears obvious that this conduct was indeed part of the same series of events as the murder for which petitioner was charged. It is also obvious that the need to cover up this crime *inter alia* was a motivation for the murder. Thus, the Georgia Supreme Court has held that

> [g]enerally on a prosecution for a particular crime, evidence of another and distinct crime wholly independent from that for which one is on trial is inadmissible; but there are exceptions of this rule. One is, if the separate crime was committed as a part of the same transaction as that for which the accused is being tried, and forms a part of the res gestae.
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> *Hill v. State*, 201 Ga. 300, 303 (1946).

The Georgia Supreme Court found this rule applicable to the present facts. *Burger v. State*, 242 Ga. 28, 32 (1978). I find no reason to doubt this view. Similarly, I find no reason to question the trial court's rulings with respect to Stevens' other statements made in the course of the conspiracy. Such a determination seems entirely proper under state law. Ga. Code Ann. § 38-306. Furthermore, I can find no basis to support a conclusion that Georgia law with respect to statements of co-conspirators is subject to any constitutional infirmity. In fact, of course, the Georgia rule has been specifically approved

by the United States Supreme Court. *Dutton v. Evans*, 400 U.S. 74 (1970).[5]

Petitioner's second argument for general reversal relates to alleged inadequacies in the performance of counsel with respect to virtually every aspect of the preparation and presentation of his defense. The Court will not attempt to recount all the supposed failings of Mr. Leaphart. However, it appears that this charge involves several major allegations: (1) that a conflict of interest existed because Mr. Leaphart's partner defended Stevens in a later, separate trial; (2) that counsel failed to distinguish in his own mind and the jury's between the actions of the petitioner and Stevens; (3) that counsel failed to adequately investigate, research and present petitioner's *Jackson v. Denno* claim; (4) that counsel failed to investigate or question the composition of the jury, on which blacks and other minorities were in fact underrepresented; (5) that counsel failed to develop mitigating factors with respect to sentence; and, (6) that counsel inadequately presented petitioner's case on appeal.

As was indicated above, this Court conducted an evidentiary hearing relating specifically to these claims. At this hearing, Mr. Leaphart testified at length on the theory and conduct of petitioner's defense. Counsel indicated in substance that his strategy was to force the prosecution to prove all the elements of the case, while raising every objection available under the rules of evidence. Counsel also indicated that he tried at all times to avoid placing the petitioner on the stand because he

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[5] *Dutton* approves an application of the Georgia hearsay rule considerably more dubious than anything in the present case. Here, the co-conspirator's statements were generally adopted explicitly by petitioner as they were made. Moreover, Botsford's testimony involved statements during the actual development of the criminal conduct or specific efforts to conceal those actions. In *Dutton*, the court dealt with a statement made over a year after the crime was committed and wholly unrelated to any concealment effort.

feared that the jury would find little reason for mercy in petitioner's quite unremorseful attitude toward the crime. Similarly, counsel indicated that he had met with Mr. Burger's mother and discussed the possibility of her or others testifying in mitigation. However, Mr. Leaphart stated that he decided against using such testimony when it became apparent that it could provide little specific positive evidence, even though much unfavorable testimony was likely to emerge on cross examination. Mr. Leaphart also stated that his conduct of the petitioner's case was in no way hampered by his partner's defense of Stevens.

The legal standard with respect to this claim is stated easily enough. Petitioner is entitled to counsel likely to render and in fact rendering reasonably effective assistance. *Jones v. Estelle*, 622 F.2d 124 (5th Cir. 1980). Of course, this standard does not require errorless counsel. *United States v. Johnson*, 615 F.2d 1125 (5th Cir. 1980). Nor is it intended to require that an attorney's performance be ideal in every strategic or substantive particular. It is only necessary that counsel's performance fall within a sphere of reasonable legal skill and practice. When considered in these terms, the Court sees no basis for a finding of constitutional error.

Reviewing first petitioner's allegations of conflict of interest, it is important to note that such a conflict must be actual rather than merely speculative to support relief. *Zuck v. Alabama*, 588 F.2d 436, 439 (5th Cir. 1979). Furthermore, it is clear that not every conceivable conflict is so egregious as to amount to a Sixth Amendment violation. *United States v. Alvarez*, 580 F.2d 1251, 1255 (5th Cir. 1978). In this connection, it is particularly significant that even joint representation of codefendants need not be a *per se* constitutional violation. *Foxworth v. Wainwright*, 516 F.2d 1072 (5th Cir. 1975). Thus, the present case would hardly demand an inference of error where the two indictees were tried separately by different, if also professionally associated, attorneys.

Petitioner has attempted to meet this problem by alleging that Stevens' defense was inconsistent and, hence, that Mr. Leaphart was under some pressure to temper his efforts so as to avoid undercutting his partner's theories.

However, Mr. Leaphart's uncontradicted testimony was that the defense of Stevens did not in fact involve inconsistent theories. Moreover, Mr. Leaphart's similarly uncontradicted position was that he in no way tailored his strategy toward protecting Stevens. This testimony is strongly supported by examination of trial record, which shows considerable effort to gain mercy for petitioner by portraying Stevens as the chief architect of the crime. *See, e.g.*, T. 257-62. The present facts thus support no inference of any conflict of interest actual or potential. Neither do they admit an inference of prejudice arising out of counsel's alleged attempt to protect his partner's client. Similarly, it is clear from the trial record that Mr. Leaphart did not confuse petitioner's conduct with Stevens'. Quite the opposite, counsel objected repeatedly to Botsford's testimony to confuse the words of the two men. *See, e.g.*, T. 95, 98, 101, 106. Moreover, at petitioner's retrial, Mr. Leaphart used a chart specifically detailing the acts of each man in a direct effort to convince the jury of petitioner's lesser role in the various crimes. Plaintiff's Exhibit 1.

The Court is likewise unable to conclude that Mr. Leaphart failed to conduct proper research and investigation in the preparation of petitioner's defense at trial or on appeal. In fact, the trial record shows that Mr. Leaphart cited numerous authorities to the court in support of his arguments with respect to the evidence and the admissibility of the confession. *See, e.g.*, T. 264. Counsel also presented these arguments on appeal and in fact, of course, gained a partial reversal. Petitioner has offered no basis for concluding that additional measures were appropriate or would have been efficacious in any way.

Much the same situation prevails with respect to petitioner's claim of constitutional error in failure to investigate or challenge jury composition. There has been no showing made that such efforts were within the range of essential defense strategies and no showing that any useful result would have been achieved. Moreover, there is good reason to doubt both propositions in view of the fact that petitioner is white and, as a stranger to the community, not obviously subject to any particular local prejudice. Furthermore, according to Mr. Leaphart's uncontradicted testimony, the actual composition of the jury panel did not appear to reflect any such underrepresentation.

The Court is much more concerned by petitioner's allegations of ineffective assistance of counsel with respect to sentencing. Petitioner contends that Mr. Leaphart failed to interview him adequately so as to develop available mitigating factors. Petitioner also alleges that Mr. Leaphart failed to develop or use mitigating evidence which could have been obtained particularly from Mr. Burger's mother, Mrs. Betty Foster, who was present at trial and retrial. In support of these claims, petitioner offered testimony from Mrs. Foster in which she described at length the obviously quite unstable, unhappy home life Mr. Burger experienced as a child. Petitioner also offered a number of affidavits from childhood associates of the petitioner which similarly noted the difficulties he experienced as a youth and asked mercy in his behalf. Petitioner thus attempted to show that favorable evidence was available and, hence, that Mr. Leaphart's performance did not amount to harmless error. See *Davis v. Alabama*, 596 F.2d 1214 (5th Cir. 1980).

As was indicated above, Mr. Leaphart made a strategic decision in his conduct of the case to avoid revealing information concerning the petitioner's character to the maximum extent possible. Mr. Leaphart decided against calling petitioner to testify particularly because he feared that the jury would react adversely to Mr. Bur-

ger's "indifference" toward his crime and his generally "sadistic" attitude. Counsel also indicated that he had discussed the possibility of her testifying with Mrs. Foster several times, but decided against this, too, to avoid revealing violent conduct in petitioner's past.[6] Mr. Leaphart acknowledged that his strategy meant that some perhaps helpful information would not reach the jury; but, he felt nonetheless that a more complete presentation would have produced an "end result not to his benefit."

This Court is well aware of the extraordinary difficulty associated with deciding whether to offer character evidence in a capital case. When counsel decides to adduce none, a claim of ineffective assistance is all but guaranteed. On the other hand, when evidence is offered, the chance to make opening and closing arguments is lost. Moreover, counsel is without power to prevent the jury's hearing evidence of bad character which his witnesses may also possess. In the present case, all these considerations seem to have been reviewed by counsel in making his necessarily difficult decision. It further appears that Mr. Leaphart made a much more than merely adequate effort to gain maximum advantage from his choice. Thus, he, in fact, offered an extended and, at points, quite imaginative argument[7] for Mr. Burger. In this argu-

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[6] Mrs. Foster testified that Mr. Leaphart made only very minimal efforts to discuss petitioner's case with her and to develop possible mitigating factors. Mr. Leaphart's account suggested that he had talked with Mrs. Foster several times and made adequate if hardly ideal inquiries. Mr. Leaphart's account is supported by his bill, which lists two conferences totaling three and a half hours prior to trial and four conferences of unstated duration prior to retrial. Defendant's Exhibits 1, 2. Thus, the Court must conclude that Mr. Leaphart's investigation appears to meet at least minimal professional standards.

[7] Now, you get back down to capital punishment and the reason for capital punishment. The District Attorney has alluded to the "eye for an eye, and a tooth for a tooth", "life for life". Well, that is the old Jewish law, and still is the Jewish law, and is still the law

ment, counsel made full use of the lack of any evidence of prior violent crime by Mr. Burger. T. 426-27.

Thus, this Court has the task of weighing a strategic decision which was reached with at least some awareness of the relevant facts and then carried out in a manner which clearly meets "reasonable" professional standards. In this connection, petitioner has made much of the alleged benefits have accrued had Mrs. Foster and

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as the Moslems carry out in the desert communities in the Arabian deserts and places of that nature, where they live in tribes and move from place to place.

The reason for the Mosaic Law and the reason, one of the basic reasons for that harsh justice that was imposed by the earlier Jews in their march from Egypt to they finally got to the Promise Land was the fact that they would not stay long in one place, that they couldn't put up with prisoners. They couldn't—they had no way to house prisoners. So when you did something wrong, when you stole something from somebody, when you got in a fight with somebody and put out somebody's eye, or when you killed somebody, well, they just said, "well, you've killed him, so that's it. Blam, because we don't have time to fool with you, because we've got to be on down the road about another thirty or forty miles tomorrow and we have no place for you."

They needed the swift tribal justice. And, that swift tribal justice. If you read in the papers, is still being carried in Saudi Arabia, and places like that, because these people still move about in the same manner that Moses and them moved about thousands of years ago.

After the Jewish people settled in what is now Israel or the Promise Land, they went from an urban—from a tribal society which moved about to a—from tribal to nomadic society, to an urban society, and they built houses, and communities, and they lived in one place. And, at that time they began to build prisons, and places of punishment and confinement for people who committed crimes.

They no longer cut their hands off, or put out their eyes, or chopped their heads off if they did certain things. They began to an urban way of life. And, with the help of the Romans they progressed up until the time of Jesus Christ.

Now, Christ came along and brought in the idea that "wait a minute, we don't need this old attitude of an eye for an eye, and a tooth for a tooth. . . . T. 428-29.

others been called to testify. However, it seems obvious that Mrs. Foster's testimony would surely have robbed petitioner of perhaps the major argument in his brief, *i.e.*, counsel's claim that "[t]his is a man who has never, as far as the evidence in this case is concerned, never been in any trouble in his life." T. 426. Petitioner's case would have been supplemented only to the extent of a declaration of maternal love from a woman whose own background and conduct was far from ideal.[8]

In sum then, the Court must conclude that the evidence available to petitioner was in fact much as Mr. Leaphart believed. Some favorable testimony could probably have been adduced, but any good impact would surely have been at best much obviated by unfavorable information which would also have been revealed. Mr. Leaphart balanced these factors and determined that petitioner was best served by retaining closing argument and then exercising this privilege unencumbered by evidence of petitioner's prior misdeeds. This decision may or may not have been "right." Certainly, if the test is the jury's ultimate decision, it was not. But, this Court cannot say that it amounted to error of constitutional dimensions. I cannot conclude that petitioner was not afforded "reasonably effective" assistance of counsel.

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[8] Similarly, the Court notes that the affidavits supplied by the petitioner do contain references to a difficult childhood which might have created some sympathy for Mr. Burger. However, there are also many details which would support inferences extremely unfavorable to his cause. Thus, one hometown associate refers to "when Chris got into trouble and was on juvenile probation." Affidavit of Phyllis Russell. Another states that "[s]ometimes he would be a nice, normal guy, then at times he would flip out and would get violent over nothing." Affidavit of Earnest R. Holtsclaw. Another refers to possible serious drug abuse. Affidavit of Ruth Alson.

(3)

There remain before this Court only two allegations of error, each relating exclusively to the sentencing trial, or, more accurately, retrial. Petitioner first attacks the jury's finding that the offense was "outrageously or wantonly vile, horrible or inhumane in that it involved torture, depravity of mind, or an aggravated battery to the victim." Ga. Code Ann. § 27-2534.1b(7). Petitioner contends in particular that this provision is too broad and vague to channel jury discretion adequately and further that, in reviewing petitioner's sentence, the Georgia Supreme Court failed to supply a limiting construction which might have met the problem of overbreadth as applied to the present facts.

Of course, this argument is derived from the Supreme Court decision in *Godfrey v. Georgia*, 446 U.S. 420 (1979). In *Godfrey* the court did indeed find the errors petitioner claims here with respect to b(7). However, it is obvious from the analysis employed by the Court that b(7) is not to be considered unconstitutionally vague in all circumstances. In fact, the plurality opinion finds it unconstitutional only as applied to the particular facts in question and only then after an analysis of limiting definitions which had been or might have been used with respect to b(7).

Of particular interest here is the Supreme Court's view of the standard applied by the Georgia Supreme Court to b(7) cases prior to 1977:

> [T]he Georgia Supreme Court had by 1977 reached three separate but consistent conclusions respecting the (b)(7) aggravating circumstances. The first was that the evidence that the offense was 'outrageously or wantonly vile, horrible or inhuman' had to demonstrate torture, depravity of mind, or an aggravated battery to the victim. The second was that the phrase 'depravity of mind' comprehends only the kind of mental state that led the murderer

> to torture or to commit an aggravated battery before killing his victim. The third, derived from *Blake* alone, was that the word 'torture' must be construed in para materia with aggravated battery' so as to require evidence of serious physical abuse of the victim before death.
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> 446 U.S., at 431 (Stewart, JJ.).

Thus, while *Godfrey* is hardly a model of clarity, it appears that the plurality opinion at least implicitly approves sentencing reviews which can be said to apply this limiting standard. It appears also that, if petitioner's crime can be said to fall within these parameters, no constitutional error is to be found in the jury's determination that b(7) was satisfied. Of course, the present case involves many circumstances which may readily be seen as involving "torture" and reflecting "depravity of mind." There was ample evidence upon which the jury might have found that petitioner aided and abetted in Stevens' sodomizing the victim prior to his death. Serious sexual abuse has been equated with "torture" under Georgia law. *House v. State*, 232 Ga. 140 (1974). Similarly, serious physical abuse can readily be seen in the confining of the victim in the car trunk for a period of hours, bound, nude and certainly anxious in the extreme over his captors' intentions. Likewise, there can be little argument but that petitioner's sadistic inquiry into Private Honeycutt's condition prior to submerging the taxi well-demonstrated "depravity of mind" and, further, that the victim's horror as the trunk inexorably filled amounted to "torture." Certainly, there is little similarity between the circumstances of this crime and the "domestic murders" considered by the Supreme Court in *Godfrey*.

This Court concludes that the evidence here readily supported the jury's finding of aggravating circumstance b(7). Likewise, there can be no doubt that there was evidence sufficient to support the jury's finding with

respect to the two remaining aggravating factors, *i.e.*, that it was committed in the course of other capital crimes, namely, kidnapping and armed robbery. However, the Georgia Supreme Court nonetheless found error in the trial court's charge with respect to these factors. *Burger v. State*, 245 Ga. 458 (1980). Noting that the jury instructions had included no description of the elements of kidnapping and armed robbery, the Georgia court held that

> [w]here a defendant in a capital case is not charged during the guilt-innocence phase with the capital felony designated as an aggravating circumstance, the trial court would be required to charge the definition of that capital felony as part of its instruction to the jury during the sentencing phase of the trial, unless such charge has been waived.
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> 245 Ga., at 461.

The Georgia Supreme Court also noted that the trial judge referred to kidnapping as a capital crime, without adding that this is true only where there is bodily injury to the victim or the crime is for ransom.

The Georgia Supreme Court thus found that the jury's determination with respect to these two factors was flawed. Nonetheless, the Court held that petitioner's death sentence need not be reversed because b(7) had been properly charged and found:

> Where two or more aggravating circumstances are found by the jury, the failure of one circumstance, or in this case two, does not taint the proceedings so as to invalidate the other aggravating circumstance found and the sentence of death based thereon . . . the verdict may be upheld upon this ground and the failure to properly charge the other aggravating circumstances does not render the jury's verdict invalid.
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> 245 Ga., at 462.

This Court is, of course, bound by interpretation of state law from the Georgia Supreme Court. *Sandstrom v. Montana*, 442 U.S. 510, 516 (1979). Thus, it is established that the trial court in petitioner's case did indeed fail to follow the state capital punishment statute properly. However, the Georgia court's further conclusion that this finding did not necessitate reversal of petitioner's sentence raises significant constitutional issues that this Court must review independently. In particular, the Court must consider here whether the jury which handed down the death penalty was sufficiently guided in its deliberation to comply with the constitutional standard set forth first in *Furman v. Georgia*, 408 U.S. 238 (1972).

Petitioner argues that the jury's verdict was based upon all three aggravating factors. Thus, it is contended that there is no way to determine to what degree the jury was influenced by the erroneous instructions. Petitioner relies here primarily upon the holding of the Fifth Circuit in *Stephens v. Zant*, 631 F.2d 397 (5th Cir. 1980). In *Stephens*, the jury had considered four possible aggravating factors, and found three in fact present. On this basis, the jury returned the death penalty. However, the Georgia Supreme Court subsequently held that one of these factors, relating to defendants "having a substantial history of serious assaultive criminal convictions" was unconstitutionally vague. Ga. Code Ann. § 27-2534.1(b)(1). *Stephens v. State*, 237 Ga. 259 (1976). The Georgia court nonetheless found the sentence valid based upon the same logic applied to petitioner here.[9] In *Stephens*, the Fifth Circuit reversed. The Court began its analysis by noting prior Supreme Court opinions which established that, if a jury is instructed to consider several grounds for conviction, one of which later proves to be unconstitutional, and the

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[9] *Burger v. State* cites as authority for the conclusion here under review the case of *Stephens v. Hopper*, 241 Ga. 596 (1978).

reviewing court cannot determine thereafter whether improper grounds were relied upon, the verdict must be set aside. *Stranberg v. California*, 283 U.S. 359, 367-68 (1931). *Accord*, *Bachellor v. Maryland*, 397 U.S. 564, 570-71 (1970); *Street v. New York*, 394 U.S. 576, 585-88 (1969); *Yates v. United States*, 354 U.S. 298, 311-12 (1957).

The Court further observed that this principle applied with particular forces to capital cases. The Court thereby noted that under *Furman* the death penalty cannot be imposed under "sentencing procedures that create a substantial risk that the penalty will be inflicted in an arbitrary and capricious manner." 631 F.2d, at 406. Instead, the Constitution demands that a jury's discretion be channelled by objective standards which "make rationally reviewable the process for imposing a sentence of death." *Woodson v. North Carolina*, 428 U.S. 280, 303 (opinion of Stewart, Powell, and Stevens, JJ.).

Applying these considerations to the facts in *Stephens*, the court concluded that the jury's discretion had not been adequately directed and further that the resulting sentence was not subject to "rational review" as constitutionally required. The Court based this holding upon several grounds. First, it seemed at least possible that jurors would have found the factors properly before it insufficient to support the death penalty without the presence of the third, unconstitutional bases. Second, the court found that the presence of the third aggravating factor enabled the jury to consider prior convictions which would otherwise not have been before it.[10] Third,

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[10] The Court must point out that in *Gregg* the plurality expressed the following views on the scope of the evidence to be considered in the sentencing procedure:

> We think that the Georgia court wisely has chosen not to impose unnecessary restrictions on the evidence that can be offered at such a hearing and to approve open and far-ranging argument. See, *e.g.*, *Brown v. State*, 235 Ga. 644 (1975). So long as the evidence introduced and the argument at the pre-

the court found that the presence of this improper factor may have directed particular attention to the defendant's prior convictions. The court thus concluded that

> [i]t cannot be determined with the degree of certainty required in capital cases that the evidence of those convictions, together with the instruction, did not make a critical difference in the jury's decision to impose the death penalty.
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> 631 F.2d, at 406.

Respondent has opposed application of this analysis on several grounds. It is contended first that *Stromberg* and other cases relied upon by the *Stephens* panel are inapposite because each involved a general verdict. In the present instance, any one aggravating factor would be sufficient to support the jury's verdict. Thus, it is contended that as long as one factor remained valid, there was no basis for reversal. Second, respondent points out that in *Stephens* the court considered an unconstitutional aggravating factor, whereas the present case relates only to an incomplete charge. Respondent also finds indications that the Supreme Court sees no problem in this area in several recent actions. Respondent relies particularly on the denial of certiorari in *West-*

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sentence hearing do not prejudice a defendant, it is preferable not to impose restrictions. We think it is desirable for the jury to have as much information before it as possible when it makes the sentencing decision.

428 U.S., at 203-4 (Stewart, Powell, and Stevens, JJ.). In *Brown*, the Georgia Supreme Court notes that "evidence of general bad character could be admitted in those cases when the defendant had been notified prior to trial that such evidence would be presented." 235 Ga., at 649. Included as permissible evidence of bad character were "prior criminal convictions, and pleas of guilty or pleas of nolo contendere. . . ." 235 Ga., at 648. Thus, it appears that prior convictions could have been placed before the jury even in the absence of the unconstitutional aggravating factor. It further appears that under *Gregg*, no constitutional problem is thereby created. See also 428 U.S., at 163-164.

brook v. Balkcom, —— U.S. ——, 28 Crim.L.Rptr. 4087-88, decided November 17, 1980. *Westbrook* involved a defendant sentenced to death pursuant to a finding of b(7) and one other aggravating factor. Dissenting from the denial, Justice White specifically opined that "[t]he imposition of the death sentence, despite a failure to sustain all of the aggravating circumstances found by the jury, does not conflict with either *Stromberg v. California* or *Street v. New York*." (dissenting opinion). Similarly, Justice Stevens wrote that the Georgia Supreme Court's view was "consistent with the Court's decisions." (concurring opinion).

Respondent's arguments are not without force. At the least, some significant support for the position of the Georgia court has been located on the United States Supreme Court. However, it is obviously true also that these are the views of only two justices, and further that their position is counterbalanced by Justice Stewart who supports and even expands the *Stephens* rationale:

> Georgia law would prohibit a further finding that the error was harmless simply because of the existence of the other aggravating circumstance. Under Georgia's capital sentencing scheme, the trial court is the sentencing authority. Ga. Code Ann. §§ 27-2503(b), 27-2534.1(b). In addition, the sentencer has the power to decline to impose the death penalty even if it finds that one or more aggravating circumstances are present.
>
> —— U.S. ——(1980).

Furthermore, it does not appear that respondent's remaining arguments can be given significant weight. *Stephens* does involve an aggravating factor which was found to be unconstitutionally vague on its face. However, the Georgia statute itself was approved only insofar as it was applied properly. *Gregg v. Georgia*, 428 U.S. 153, 198 (1975) (Stewart, Powell, and Stevens, JJ.).

Thus, the failure to adequately adhere to its strictures would appear to amount to error of constitutional dimensions in the present case and, indeed, generally. *Gregg* seems to leave no "gap" between constitutional and statutory error. At the least, constitutional error would certainly develop where error under state law created the "substantial risk" of the arbitrariness, which was prohibited by *Furman* and found present in *Stephens*.

Similarly, the distinction between general and special verdicts in the peculiar context of capital punishment avails respondent little. The Georgia statute does require a specific finding of aggravating circumstances, but the jury is, of course, free to decline to impose death even where such aggravation is present. Thus, the removal of a specific factor would not vitiate a finding of other factors, but it might well alter a jury's ultimate determination of death, which is after all the subject of appellate review. While the jury may be seen as returning a special verdict as to the presence or absence of particular circumstances, its ultimate determination of death is nonetheless general because it is not dictated by these factors, but only *permitted* under them. This Court concludes then that, even in the absence of *Stephens*,[11] the important question is not whether the jury *could* have imposed death without the improper charge, but whether it in fact *did* impose sentence based in some part on this consideration. More particularly, the Court must consider whether "substantial risk" of unguided discretion was created and whether "rational" appellate review was thereby precluded.

The present case is certainly not identical to *Stephens*, but the facts here point to no different result. The Court notes first that the lone remaining factor, b(7), has been specifically criticized for the at best slight guidance

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[11] The value of *Stephens* as precedent is somewhat diminished by respondent's motion for rehearing and rehearing en banc. This motion was filed December 8, 1980.

which it provides for a sentencing jury. In *Godfrey*, b(7) is referred to as creating grave risk of "standardless and unchanneled imposition of death sentences in the uncontrolled discretion of a basically unstructured jury." (Stewart, Blackmun, Powell, Stevens, JJ.). To be sure, there is no holding that b(7) is unconstitutional *per se*. But, nonetheless, the fact that the sole proper instruction received by the jury related to this admittedly quite vague factor can only heighten the Court's awareness of the danger of an unconstitutionally arbitrary sentencing decision.

Much more important, however, is the fact that the major thrust of Mr. Leaphart's closing argument was directed toward portraying Stevens as much the more active participant in the crimes which preceded the murder and provided the improperly charged aggravating factors. Such an argument is plainly not frivolous in view of the many Georgia cases which accord different sentencing treatment to a "triggerman" as against his accomplice, despite the fact that the technical legal status of each is the same. *See, e.g., Thomas v. State*, 246 Ga. 484 (1980). Obviously, an essential basis for considering the relative complicity of petitioner and Stevens in these crimes would be some definition of the precise legal elements of each. Full description of these crimes would surely have permitted a far more informed evaluation of the relative fault of petitioner and Stevens. Without such an explanation this Court cannot say whether the jury simply rejected the distinctions advanced by Mr. Leaphart or whether they were never properly considered because the jury lacked proper foundation for such a review. In many circumstances, the Court might be willing to resolve doubts such as these against petitioner. However, in a capital case especially, this Court is unwilling to label such doubts as insubstantial. I must conclude that a "substantial risk" of impermissible discretion was created by the trial court's charge. I must also

conclude that this risk makes "rational" review of the jury's decision impossible.[12]

Conclusion

The Court has herein considered a lengthy assemblage of alleged errors. These arguments are in overwhelming part insubstantial if not in fact frivolous.[13] It does not appear to this Court that petitioner's trial was in any significant way unfair. The Court most definitely finds no basis for concluding that Mr. Leaphart's representation was constitutionally inadequate. However, I do find that the sentencing phase of petitioner's trial was flawed in a way that may have prevented an informed process of jury deliberation and appellate review. Since it cannot be said that this possibility is not substantial, peti-

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[12] The Court notes also that there is basis in the trial record for believing that the jury's decision may have been a close one. In the first sentencing trial, the jury in fact returned after some period of deliberation to ask the trial court what parole chance the petitioner would have were he sentenced to life imprisonment. T. 438. Thus, it appears that there was some sentiment for not imposing the death penalty despite the obviously extreme nature of the crime and the equally obvious availability of aggravating factors to support such a result. At least, in the minds of this first jury, which was charged similarly to the second, T. 434, petitioner's does not seem to have been viewed as an "open and shut" case.

[13] This Court is particularly concerned by arguments raised with respect to ineffective assistance of counsel. I certainly do not question the wisdom or the propriety of advancing every legitimate argument on petitioner's behalf. However, many, if not all, the allegations made against Mr. Leaphart are directly contradicated by the record. Thus, they could not possibly be of any benefit to Mr. Burger. On the other hand, the raising of such unfounded charges must have a significant "chilling effect" on the willingness of experienced attorneys, like Mr. Leaphart, to undertake the defense of capital cases. Petitioner's attorneys here might do well to reconsider their apparent policy of routinely attacking the performance of trial counsel in light of this fact.

tioner must be remanded to the Superior Court of Wayne County for further proceedings not inconsistent with this opinion.

So Ordered this 29 day of April, 1981.

/s/ B. W. Edenfeld
Judge, United States District Court
Southern District of Georgia

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 81-7419

CHRISTOPHER A. BURGER,
PLAINTIFF-APPELLEE, CROSS-APPELLANT

v.

WALTER A. ZANT, Warden,
Georgia Diagnostic and Classification Center,
DEFENDANT-APPELLANT, CROSS-APPELLEE

Oct. 13, 1983

Appeal from the United States District Court
for the Southern District of Georgia

Before VANCE and JOHNSON, Circuit Judges, and ALLGOOD *, District Judge.

VANCE, Circuit Judge:

The state of Georgia appeals the district court's grant of a petition for a writ of habeas corpus setting aside the death sentence of Christopher Burger.

The facts in this case are set out in the district court's opinion. *Burger v. Zant*, 513 F. Supp. 772, 788-89 (S.D. Ga. 1981). Briefly, Christopher Burger and Thomas Stevens, both soldiers at Fort Stewart, Georgia, were indicted for the murder of Roger Honeycutt, also a soldier. On September 4, 1977, Burger and Stevens decided to rob a taxicab driver. The victim, who supplemented his

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* Honorable Clarence W. Allgood, U.S. District Judge for the Northern District of Alabama, sitting by designation.

military income by driving a taxi, picked up the two men. Burger and Stevens threatened Honeycutt with knives, forced him to stop the cab and robbed him of sixteen dollars. The victim was placed in the back seat of the cab with Stevens. As Burger drove the vehicle, Stevens forced Honeycutt to disrobe and then to participate in acts of oral and anal sodomy. The victim, nude and bound, was then placed in the trunk of the cab.

With Honeycutt still in the trunk, Burger drove the cab to the local airport, where he and Stevens met a friend and fellow soldier, James Botsford. As they drove back to Fort Stewart, Burger and Stevens explained what they had done, confirming their story by exchanging remarks with Honeycutt in the trunk. After some discussion, Botsford convinced his friends to promise to release Honeycutt unharmed. They dropped Botsford off at the post.

Burger and Stevens then drove to a nearby "borrow pit" which was filled with water. After removing their fingerprints from the cab and removing its radio, Burger raised the trunk and asked Honeycutt if he was all right. Honeycutt responded affirmatively. Burger then closed the trunk, started the car and drove it into the pond, jumping out as it entered the water. The victim died by drowning.

Christopher Burger was convicted of murder and sentenced to death. Stevens was tried separately, convicted, and also sentenced to death. *Stevens v. State*, 242 Ga. 34, 247 S.E.2d 838 (1978). On direct appeal to the Georgia Supreme Court, Burger's conviction was affirmed but his death sentence was vacated and the case remanded for resentencing. *Burger v. State*, 242 Ga. 28, 247 S.E.2d 834 (1978).

On remand, Burger was once again sentenced to death and the sentence was affirmed by the Supreme Court of Georgia. *Burger v. State*, 245 Ga. 458, 265 S.E.2d 796 (1980). The United States Supreme Court denied certiorari. 448 U.S. 913, 101 S.Ct. 31, 65 L.Ed.2d 1175 (1980).

After unsuccessfully exhausting available state post-conviction remedies. Burger filed a petition for a writ of habeas corpus in federal district court. The district judge granted the writ insofar as it vacated Burger's death sentence.

The state of Georgia as appellant and Burger as appellee/cross-appellant raise five issues before this court: whether Burger was denied effective assistance of counsel; whether the jury instructions impermissibly shifted the burden of proof onto the defendant; whether *Miranda* violations occurred; whether the district court properly vacated Burger's death sentence where the jury instructions concerning two of the three aggravating circumstances upon which it was based were insufficient; and whether the jury instruction on the aggravating circumstance set out in Ga. Code Ann. § 27-2534.1(b)(7) sufficiently channeled the discretion of the jury to impose the death sentence.[1] All of these questions were carefully analyzed in District Judge Edenfield's opinion. 513 F. Supp. at 788-803. As to the first three issues, we adopt Judge Edenfield's opinion as our own. The final two issues require discussion.

(1)

The *Stephens* Issue

Christopher Burger's sentencing jury based its death sentence upon three statutory aggravating circumstances: (a) the "offense of murder was committed while the offender was engaged in the commission of another capital felony, kidnapping"; (b) the "offense of murder was committed while the offender was engaged in the commission of another capital felony, armed robbery"; (c) the

[1] In addition, Burger challenges the sufficiency of the evidentiary hearing conducted by the district court. This contention is patently frivolous. The most cursory examination of the district judge's opinion demonstrates the care with which he treated the case and the seriousness with which he regarded the issues raised by Burger.

offense of murder was "outrageously or wantonly vile, horrible or inhuman in that it involved torture and depravity of mind." On direct review, the Georgia Supreme Court held that the trial court had erroneously failed to instruct the jury on the definitions of kidnapping and robbery. The Georgia Supreme Court upheld the death sentence, however, based on the single remaining aggravating circumstance. *Burger v. State*, 265 S.E.2d at 800.

The district court vacated Burger's death sentence, holding that the Supreme Court of Georgia's disposition of the first two aggravating circumstances rendered the entire verdict invalid. The district judge based his decision on our opinion in *Stephens v. Zant*, 631 F.2d 397, *modified on panel rehearing*, 648 F.2d 446 (5th Cir. 1981),[2] and Burger and Georgia agree that *Stephens* controls this issue in the present case. Certiorari was granted in the United States Supreme Court in *Zant v. Stephens*, 454 U.S. 814, 102 S.Ct. 90, 70 L.Ed.2d 82 (1981), *question certified to the Georgia Supreme Court*, 456 U.S. 410, 102 S.Ct. 1856, 72 L.Ed.2d 222, *question answered*, 250 Ga. 97, 297 S.E.2d 1 (1982).

On June 22, 1983, the United States Supreme Court decided *Zant v. Stephens*, —— U.S. ——, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983), reversing the judgment rendered by a panel of the former fifth circuit. The Court held that under the Georgia capital punishment statute the invalidity of one of a plurality of statutory aggravating circumstances does not require that the entire death sentence be vacated. The Court found the death penalty in that case permissible because there were two remaining aggravating circumstances that "adequately differenti-

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[2] In *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (en banc) this circuit adopted as precedent all former fifth circuit cases submitted or decided prior to October 1, 1981. In *Stein v. Reynolds Sec., Inc.*, 667 F.2d 33, 34 (11th Cir. 1982), the court held that Unit B panel or en banc court decisions of the former fifth circuit also are binding precedent in the eleventh circuit.

ate[d that] case in an objective, evenhanded, and substantively rational way from the many Georgia murder cases in which the death penalty may not be imposed." *Id.* at ——, 103 S.Ct. at 2744. So long as "at least one of a plurality of aggravating circumstances found by the jury is valid and supported by the evidence," *Zant v. Stephens*, 456 U.S. 410, 414, 102 S.Ct. 1856, 1857, 72 L.Ed.2d 222 (1982), the death sentence may stand. We thus reverse the district court's order compelling resentencing based on our opinion in *Stephens*.

(2)

The *Godfrey* Issue

Burger also challenged the adequacy of the trial court's charge on the sole remaining aggravating circumstance that was applied in his case. Under Ga.Code Ann. § 17-10-30(b)(7), a jury may impose the death penalty if it finds that the defendant's crime was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." Since "[i]t is, of course, arguable that any murder involves depravity of mind or an aggravated battery," *Gregg v. Georgia*, 428 U.S. 153, 201, 96 S.Ct. 2909, 2938, 49 L.Ed.2d 859 (1976), the potential subjectivity of § (b)(7) has made it the target of numerous constitutional challenges. Although the Supreme Court ruled that § (b)(7) was not unconstitutional on its face in *Gregg*, the Court conceded that the statutory language might be subject to abuse if the Georgia Supreme Court were to adopt "an open-ended construction" of its terms. *Id.* Four years later, the Court re-examined the operation of § (b)(7) in *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct 1759, 64 L.Ed.2d 398 (1980), and concluded that the Georgia courts had strayed from the straight and narrow path marked out in *Gregg*. In *Godfrey*, there was no allegation that the murders committed by the defendant involved either torture or an aggravated battery, and the

sentencing jury based its imposition of the death penalty on the simple grounds "that the offense of murder was outrageously or wantonly vile, horrible and inhuman." The Georgia Supreme Court upheld the sentence on review, but the Supreme Court reversed. Writing for a plurality of the Court, Justice Stewart held that the jury's findings were an insufficient basis for imposing the death penalty, because "nothing in these few words, standing alone . . . implies any inherent restraint on the arbitrary and capricious infliction of the death sentence." *Id.* at 428, 100 S.Ct. at 1765. Although Justice Stewart found that the Georgia Supreme Court in *Godfrey* had ignored its responsibility "to keep § (b)(7) within constitutional bounds," *id.* at 429, 100 S.Ct. at 1765, he noted that other decisions by that court had placed a limiting construction on the statute that was sufficient to bring § (b)(7) within the ambit of constitutional acceptability:

> The *Harris* [*v. State*, 237 Ga. 718, 230 S.E.2d 1] and *Blake* [*v. State*, 239 Ga. 292, 236 S.E.2d 637] opinions suggest that the Georgia Supreme Court had by 1977 reached three separate but consistent conclusions respecting the § (b)(7) aggravating circumstance. The first was that the evidence that the offense was "outrageously or wantonly vile, horrible or inhuman" had to demonstrate "torture, depravity of mind, or an aggravated battery to the victim." The second was that the phrase, "depravity of mind," comprehended only the kind of mental state that led the murderer to torture or to commit an aggravated battery before killing his victim. The third, derived from *Blake* alone, was that the word, "torture," must be construed *in pari materia* with "aggravated battery" so as to require evidence of serious physical abuse of the victim before death.

Id. 446 U.S. at 431, 100 S.Ct. at 1766. As long as the Georgia courts observed these precedents, Justice Stewart suggested, death sentences imposed on the basis of

§ (b)(7) would meet the requirements of *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

In the present case, the trial judge charged the jury that one of the bases for imposing the death penalty was a finding "that the offense of murder was outrageously or wantonly vile, horrible or inhumane [sic] in that it involved torture and depravity of mind." Burger contends that this was insufficient to provide adequate guidance to the jury, and asserts that the trial court was required under *Godfrey* to explain and limit the meaning of § (b)(7) in accordance with the construction of the statutory language and Georgia case law presented by Justice Stewart in the plurality opinion.[3] The district

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[3] We note in passing that Burger did not object to the (b)(7) instruction at the resentencing hearing. This does not bar review of the issue under the doctrine of *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.E.2d 594 (1977), however, for either of two reasons. First, we address the issue because the Georgia Supreme Court ruled on its merits. *Burger v. State*, 265 S.E.2d at 799-800. This court recently observed that "[c]onsiderations of comity and federalism have resulted in the development of a well-settled exception to the procedural default rule of *Sykes*: where a state appellate court does not rely on a procedural default, but reaches the merits of the federal law claim, the *Sykes* bar is inapplicable." *Booker v. Wainwright*, 703 F.2d 1251, 1255 (11th Cir. 1983). Because in the present case the Georgia Supreme Court "entertained the federal claims on the merits, a federal habeas court must also determine the merits of appellant's claim." *Lefkowitz v. Newsome*, 420 U.S. 283, 292 n.9, 95 S.Ct. 886, 891 n.9, 43 L.Ed.2d 196 (1975). *See also County Court v. Allen*, 442 U.S. 140, 154, 99 S.Ct. 2213, 2223, 60 L.Ed.2d 777 (1979); *Francis v. Henderson*, 425 U.S. 536, 542 n.5, 96 S.Ct. 1708, 1711 n.5, 48 L.Ed.2d 149 (1976); *Westbrook v. Zant*, 704 F.2d 1487, 1491 n.6 (11th Cir. 1983); *Henry v. Wainwright*, 686 F.2d 311, 313 (5th Cir. Unit B 1982), *on remand from* 457 U.S. 1114, 102 S.Ct. 2922, 73 L.Ed.2d 1326 (1982); *Machetti v. Linahan*, 679 F.2d 236, 238 n.4 (11th Cir. 1982); *Washington v. Watkins*, 655 F.2d 1346, 1368 (5th Cir. Unit A 1981), *cert. denied*, 456 U.S. 949, 102 S.Ct. 2021, 72 L.Ed.2d 474 (1982); *Sasoon v. Stynchcombe*, 654 F.2d 371, 374 (5th Cir. 1981); *Moran v. Estelle*, 607 F.2d 1140, 1142-43 (5th Cir. 1979);

court did not expressly address the issue of whether a limiting construction was required at the sentencing phase, but two recent decisions of this circuit have rejected the argument that *Godfrey* requires the trial court to supply additional definitions or a limiting instruction in its charge to the jury. *See Westbrook v. Zant*, 704 F.2d 1487, 1501, 1504 (11th Cir. 1983); *Stanley v. Zant*, 697 F.2d 955, 971 (11th Cir. 1983).

The facts of *Stanley* in particular have some similarity to those in this case. Ivon Ray Stanley and his codefendant robbed their victim at gunpoint, then compelled him to accompany them to a wooded area where they beat and shot him before burying him alive. At the sentencing phase of Stanley's trial, the judge charged the jury in terms that were essentially identical to those employed by the trial court in the present case, instructing them that they could impose the death penalty if they found that Stanley's offenses were "outrageously and wantonly vile, horrible and inhuman, in that the offenses involved Defendant's depravity of mind and torture to the victim." *Stanley*, 697 F.2d at 971-72. The jury found that Stanley's offense "involved depravity of mind and torture to the victim" and sentenced him to death. *Id.* This court distinguished *Stanley* from *Godfrey* on the grounds that the charge used in the former (as well as in this case) required the jury to find that the crime involved both torture *and* depravity of mind, whereas the formulation used by the trial judge in *Godfrey* was phrased in the disjunctive language of the statute and permitted the jury to sentence the defendant to death on

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Cannon v. Alabama, 558 F.2d 1211, 1216 n.12 (5th Cir. 1977), *cert. denied*, 434 U.S. 1087, 98 S.Ct. 1281, 55 L.Ed.2d 792 (1978).

Second, the state has not raised the procedural default issue and thus it must be deemed waived. *See Goode v. Wainwright*, 704 F.2d 593, 596 n.1, 612 n.25 (11th Cir. 1983); *Washington v. Watkins*, 655 F.2d at 1368; *Smith v. Estelle*, 602 F.2d 694, 708 n.19 (5th Cir. 1979), *aff'd*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1980); *LaRoche v. Wainwright*, 599 F.2d 722, 724 (5th Cir. 1979). *Cf. Lamb v. Jernigan*, 683 F.2d 1332, 1335 n.1 (11th Cir. 1983) (state waives exhaustion requirement by failing to raise it).

finding that the crime evidenced either torture or depravity of mind or an aggravated battery.[4] The jury's findings in *Godfrey* did not make it apparent which, if any, of these factors it had relied on in sentencing the defendant to death, and the absence of any evidence suggesting that the defendant had tortured or physically abused his victims before their deaths led Justice Stewart to conclude that there was "no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." *Godfrey*, 446 U.S. at 433, 100 S.Ct. at 1767. In contrast, the instructions given the *Stanley* and *Burger* juries prevented them from imposing the death sentence unless they found that the victims had in fact been tortured before death. Since the jurors in each of these cases made an explicit finding that torture had occurred, we cannot say that their reasons for imposing the death penalty must remain "the subject of sheer speculation." *Id.* at 429, 100 S.Ct. at 1765. The only remaining questions are first, whether there was anything about the instructions as given that might have led the jurors to base their sentence on a mistaken interpretation of state law, *see Sandstrom v. Montana*, 442 U.S. 510, 517, 99 S.Ct. 2450, 2455-56, 61 L.Ed.2d 39 (1979), and second, whether the state law as applied in this case is constitutional.

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[4] The Georgia Supreme Court has stressed the importance of the fact that § (b)(7) is worded in the disjunctive, rather than the conjunctive. Thus, "[i]t is not required that a trier of fact find the existence of each disjunctive phrase in the statute, only that at least one phrase of the first clause of the statute exists due to the existence of at least one phrase of the second clause of the statute." *Fair v. State*, 245 Ga. 868, 268 S.E.2d 316, 320 (1980). Although the trial judge's charge in *Godfrey* was therefore technically correct, the jury returned a report that did not specify which, if any, of the phrases in the second clause was the basis of its death sentence. In addition, the potential subjectivity of the phrase "depravity of mind" renders a death sentence that is based upon that phrase alone more suspect than one that is based on both "depravity of mind" and one of the other factors as well. *See* note 5 *infra*.

Burger contends that the trial judge's instructions in his case were defective because they did not set forth Justice Stewart's construction of the Georgia law from *Godfrey*. With regard to the first two points in Justice Stewart's analysis, however, Burger's objections are easily disposed of. Although the trial judge did not expressly specify that the jury could not find that a crime was "outrageously or wantonly vile, horrible or inhuman" without making a specific finding that it demonstrated "torture, depravity of mind, or an aggravated battery to the victim," the jury in this case—unlike the jury in *Godfrey*—returned a verdict that clearly revealed its understanding that the two clauses were interrelated. Burger also contends that the jury should have been instructed that it could nct find "depravity of mind" without finding that the defendant had tortured or physically abused the victim before his death. The trial judge in *Burger*, however, clearly linked "torture and depravity of mind" in his instructions, and the jury's verdict did likewise.[5]

Burger's final objection to the trial court's charge is somewhat more troublesome. He asserts that the jury should have been instructed that the word "torture" assumes the existenec of an aggravated battery and therefore requires evidence of serious physical abuse of the victim before death. In *Stanley* and *Westbrook*, this aspect of Justice Stewart's opinion was not problematic,

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[5] Our consideration today does not reach the situation presented by a charge of depravity of mind not involving torture or aggravated battery. That question is obviously a more difficult one in the light of *Gregg* and *Godfrey*. *Cf. Westbrook v. Zant*, 704 F.2d 1487 (11th Cir. 1983) (section (b)(7) charge stated in the disjunctive held not to require instruction in excess of statutory language). Contrary to the conclusion of Justice Stewart in *Godfrey*, the Georgia Supreme Court in a line of cases extending well before that opinion has upheld findings of depravity of mind based on such factors as age of the victim, physical characteristics of the victim and mutilation, disfigurement or sexual abuse *after* death. *See Phillips v. State*, 250 Ga. 336, 297 S.E.2d 217 at 221.

since it was not disputed that in both of those cases the defendant had inflicted extreme physical abuse on his victim prior to the murder itself. *See Westbrook*, 704 F.2d at 1505 & n.18; *Stanley*, 697 F.2d at 972. In dictum, however, the *Stanley* court reflected that "[arguably], the undefined word 'torture' [might] fall[] short of meeting the [*Godfrey*] test because in a given case a jury might understand it to mean mental torture rather than a word to be read *in pari materia* with 'aggravated battery' to require evidence of serious physical abuse." *Stanley*, 697 F.2d at 972. There was no contention in *Stanley* that "the torture to which his victim was subjected was anything other than physical," *id.*, but the situation in the present case is far less clear. In *Burger*, the jury might have viewed the evidence that was presented in a number of different ways. The jury found that Burger had tortured his victim, and the evidence supports a finding beyond a reasonable doubt that Honeycutt was tortured before he died. There was sufficient evidence from which the jury may properly have concluded that Burger aided and abetted his codefendant Stevens in physically torturing Honeycutt, as well as that he personally tortured Honeycutt both physically and psychologically. On the other hand, it is also conceivable that the jury may have found that while Stevens physically tortured Honeycutt, Burger inflicted only psychological torture on him.[6] This case therefore requires us to

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[6] The district court's correct analysis of the evidence is as follows:

> Of course, the present case involves many circumstances which may readily be seen as involving "torture" and reflecting "depravity of mind." There was ample evidence upon which the jury might have found that petitioner aided and abetted in Stevens' sodomizing the victim prior to his death. Serious sexual abuse has been equated with "torture" under Georgia law. *House v. State*, 232 Ga. 140, 205 S.E.2d 217 (1974). Similarly, serious physical abuse can readily be seen in the confining of the victim in the car trunk for a period of hours, bound, nude and certainly anxious in the extreme over his

answer the question which we raised but did not resolve in *Stanley:* whether there is any significant distinction between mental or psychological and physical torture under either the law of Georgia or the Constitution. If the latter is within constitutional limits but the former is not, *Sandstrom* requires that the jury must receive instructions to this effect.

The deliberate infliction of mental anguish certainly comes within the commonly understood meaning of the word "torture," [7] and the sole support which Burger offers for his argument that the court should hold differently is the language of Justice Stewart's plurality opinion in *Godfrey.* As an initial matter, it is important to emphasize that the *Godfrey* plurality's reversal of the death sentences imposed in his case ultimately stemmed not from its dissatisfaction with the jury instructions, but from its belief that the Georgia Supreme Court had failed to carry out its place in the statutory scheme given conditional approval in *Gregg.*

> In past cases the State Supreme Court has apparently understood this obligation of carrying with it the responsibility to keep § (b) (7) within constitutional bounds. . . . Thus, the validity of the petitioner's death sentences turns on whether, in light of the facts and circumstances of the murders that he was convicted of committing, the Georgia Supreme Court

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captors' intentions. Likewise, there can be little argument but that petitioner's sadistic inquiry into Private Honeycutt's condition prior to submerging the taxi well-demonstrated "depravity of mind" and, further, that the victim's horror as the trunk inexorably filled amounted to "torture."

513 F.Supp. 798-99.

[7] In pertinent part, the definition of torture provided by *Webster's New Collegiate Dictionary* is as follows:

> 1: the infliction of intense pain (as from burning, crushing, or wounding) to punish, coerce, or afford sadistic pleasure 2a: anguish of body or mind; agony b: something that causes agony or pain.

> can be said to have applied a constitutional construction of the [statute].

446 U.S. at 429, 432, 100 S.Ct. at 1765, 1767. Thus, the key inquiry in the minds of the *Godfrey* plurality was whether the Georgia Supreme Court had kept faith with its own expressed standards in reviewing the defendant's sentences of death. Justice Stewart found that it had not done so in *Godfrey*, basing this view on his construction of the Georgia statute and case law. He noted, however, that his research was limited to cases pre-dating 1978, and he conceded that the third of the "separate but consistent conclusions" which he deduced from the Georgia case law—the requirement that torture be construed *in pari materia* with "aggravated battery"—was derived from a single decision, *Blake v. State*, 239 Ga. 292, 236 S.E.2d 637 (1977). The basis for Justice Stewart's conclusion was apparently the Georgia Supreme Court's statement that it "[c]onsider[ed] torture and aggravated battery on the one hand *as substantially similar treatment* of the victim and depravity of mind on the other hand as relating to the defendant. . . ." 236 S.E.2d 643 (emphasis added).

Although Justice Stewart's construction of the Georgia law on this point was strongly criticized at the time, *see, e.g., Godfrey*, 446 U.S. at 435-36, 100 S.Ct. at 1768-69 (Marshall, J., concurring in the judgment); 446 U.S. at 443, 100 S.Ct. at 1772-73 (Burger, C.J., dissenting); Donohue, *Godfrey v. Georgia: Creative Federalism, the Eighth Amendment, and the Evolving Law of Death*, 30 *Cath.U.L.Rev.* 13, 44-47 (1980), the Georgia Supreme Court subsequently affirmed its adherence to his construction in *Hance v. State*, 245 Ga. 856, 268 S.E.2d 339 (1980), where the court noted that "[t]orture occurs when the victim is subjected to serious physical abuse before death." 268 S.E.2d at 345. The *Hance* court went on, however, to embrace an expansive definition of the term "serious physical abuse":

> Serious sexual abuse may be found to constitute serious physical abuse. [citation omitted] Torture also

> occurs when the victim is subjected to an aggravated battery as hereinabove defined. Evidence of psychological abuse by the defendant to the victim before death where it is shown to have resulted in severe mental anguish to the victim in anticipation of physical harm may amount to serious physical abuse (i.e., torture of the victim), and also will support a finding of depravity of mind of the defendant.

Id. Subsequent decisions by Georgia's highest court have reaffirmed its interpretation of "physical abuse" as including both sexual and psychological abuse as well. *See, e.g., Phillips v. State*, 250 Ga. 336, 297 S.E.2d 217, 221 (1982); *Brown v. State*, 247 Ga. 298, 275 S.E.2d 52, 58 (1981).

Since the Georgia law therefore follows common usage in finding that the deliberate infliction of mental anguish constitutes "torture," we conclude that the trial court's failure to elaborate or define the term further does not run afoul of the rule in *Sandstrom*. In meaningful contrast to the more amorphous term "depravity of mind," "torture" has a readily understandable and generally understood meaning. This excludes a reasonable risk that the jury might give it an unintended interpretation.

We see no basis for concluding that the definition of "torture" applied by the Georgia courts violates substantive federal constitutional guarantees. The central theme of the Supreme Court's death penalty jurisprudence has always been that the states must draft and apply their capital punishment laws in a manner that "genuinely narrow[s] the class of persons eligible for the death penalty," *Zant v. Stephens*, —— U.S ——, 103 S.Ct. at 2742-43, thereby providing a "principled basis for distinguishing [a] case, in which the death penalty [is] imposed, from the many in which it [is] not." *Godfrey*, 446 U.S. at 433, 100 S.Ct. at 1767. The Georgia Supreme Court has recently demonstrated that it will not allow the

category of psychological abuse to become all-inclusive.[8] In *Phillips v. State*, *supra*, the court emphasized that a finding of "serious psychological abuse" required a showing that "the defendant inflicted deliberate, offensive and prolonged pain on his victim prior to death." 297 S.E.2d at 221. Thus, "the mere apprehension of death, immediately before the fatal wounds are inflicted" was found insufficient to justify a finding of "torture" under § (b)(7). *Id.*

We therefore decide that a death sentence may constitutionally be imposed under § (b)(7) based on a finding that the defendant inflicted either psychological or physical torture upon his victim. We can discern no principled basis for attempting to distinguish the two, and it seems highly questionable that Justice Stewart meant to draw such a distinction in *Godfrey*. The standards applied by the Georgia courts certainly restrict the class of persons eligible for the death penalty by reason of the "torture" provision of § (b)(7), and the facts of this case easily place it within the core of those the statute was designed to reach. Burger's contentions must therefore be rejected.

Having concluded that both phases of Burger's trial are free of constitutional error, we reverse the judgment of the district court and remand with instructions that the writ be denied.

REVERSED and REMANDED.

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[8] Here, of course, as in *Zant v. Stephens*, our decision "depends in part on the existence of an important procedural safeguard, the mandatory appellate review of each death sentence by the Georgia Supreme Court to avoid arbitrariness and to assure proportionality." —— U.S. at ——, 103 S.Ct. at 2749.

JOHNSON, Circuit Judge, dissenting:

I concur in the majority's opinion except that, for the following reasons, I dissent from that part of the opinion adopting the district court's opinion and order, 513 F. Supp. at 795-98, denying Burger's petition for habeas corpus relief on the grounds that he was denied the right to effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments at both of his state court trials and on appeal to the Supreme Court of Georgia. A review of the record reveals that Burger was denied the effective assistance of counsel both by his appointed counsel's active representation of his co-indictee's conflicting interest and by his counsel's failure to present any evidence in mitigation at either of his two sentencing proceedings.

A review of the general principles applicable to all ineffective assistance of counsel claims is in order. The Sixth Amendment guarantees a criminal defendant the right to "*effective* assistance of counsel, that is, counsel reasonably likely to render and rendering effective assistance." *Washington v. Strickland*, 693 F.2d 1243, 1250 (5th Cir. Unit B 1982) (en banc), *cert. granted*, —— U.S. ——, 103 S.Ct. 2451, 77 L.Ed.2d 1332 (1983). The appropriate methodology for determining whether there has been effective assistance of counsel is to examine the totality of circumstances in the record. *Baty v. Balkcom*, 661 F.2d 391, 394 (5th Cir. Unit B 1981). Although neither in capital nor in noncapital cases is defendant entitled to error-free counsel, the "number, nature and seriousness of the charges against the defendant are all part of the 'totality of the circumstances in the entire record' that must be considered in the effective assistance calculus." *Washington v. Watkins*, 655 F.2d 1346, 1357 (5th Cir. 1981).

Turning first to Burger's conflict of interest claim, in order to establish the constitutional predicate for ineffective assistance Burger must show that his counsel actively

represented actually conflicting interests. *Cuyler v. Sullivan*, 446 U.S. 335, 349-50, 100 S.Ct. 1708, 1718-19, 64 L.Ed.2d 333 (1980); *Westbrook v. Zant*, 704 F.2d 1487, 1499 (11th Cir.1983). Applying this standard to the facts of this case, the record is clear that Burger's counsel was actively representing both Burger and his co-indictee Stevens and that an actual conflict of interest between the two violated Burger's right to the effective assistance of counsel.[1]

First, it is apparent that Burger's counsel actively represented both Burger and Stevens. Both Burger and Stevens were charged with and indicted for the murder of Roger Honeycutt. Both Burger and Stevens were appointed counsel by the trial court at approximately the same time, and within a few weeks after they had been charged with the crime. Burger's appointed counsel, Leaphart, and Stevens' appointed counsel, Smith, were partners in a two-partner law firm. At the federal habeas hearing, Leaphart testified that he interviewed both Burger and Stevens. Leaphart testified that he assisted Smith in the preparation of Stevens' case and that Smith assisted him in the preparation of Burger's case. Leaphart and Smith discussed the issues involved in each case and researched the law together. Smith sat at counsel table and assisted Leaphart during Burger's trial. Although not physically present at Stevens' trial, Leaphart testified that "I worked then with—discussed the issues with Bob [Smith]. We researched the law together."[2] Smith and Leaphart collaborated in preparing the briefs for both Burger and Stevens on each defendant's first appeal to the Supreme Court of Georgia; Leaphart testified that he

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[1] The Sixth Amendment guarantee of effective assistance of counsel necessarily includes the guarantee of conflict-free counsel. *Glasser v. United States*, 315 U.S. 60, 75, 62 S.Ct. 457, 464-65, 86 L.Ed. 680 (1942); *United States v. Alvarez*, 580 F.2d 1251, 1254 (5th Cir. 1978).

[2] Transcript of Federal Habeas Corpus Hearing ("THC") at 18.

"primarily" prepared the briefs for Burger and Stevens on the second appeal to the Supreme Court of Georgia.[3] The fee received by each attorney for representing each client was deposited in the law firm's corporate account. At no time in his representation of Burger did Leaphart or the trial court ever inform Burger of a possible conflict of interest.

Whether analyzed as a situation where one attorney, Leaphart, represented both Burger and Stevens,[4] or where one law firm represented both Burger and Stevens,[5] the

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[3] THC at 40-41.

[4] The warden-appellant argues that the conflict of interest cases relied upon by Burger are inapposite as involving the representation of multiple defendants by one attorney. Here, appellant contends, Burger and Stevens were represented by "separate" attorneys. This argument is contrary to the facts as reflected by the record. Leaving aside the fact that Leaphart and Smith were partners in the practice of law, the attorneys here were each active in the defense of the other's client and "seem to have viewed themselves as a defense 'team' acting on behalf of [both] of the accused." *United States ex rel. Sullivan v. Cuyler*, 593 F.2d 512, 515 (3d Cir. 1979), *rev'd on other grounds, Cuyler v. Sullivan*, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). Leaphart consulted confidentially with Stevens, aided in preparing his case for trial, and prepared the briefs for both of his appeals. "Whatever may have been the extent of each attorney's participation in the trial of the . . . defendants, we are satisfied that it was sufficient to establish that both attorneys represented [both] defendants." *Id.*

[5] "The same principles [governing Sixth Amendment conflict of interest claims] apply where the joint representation is by two members of the same firm." *Ross v. Heyne*, 638 F.2d 979, 983 (7th Cir. 1980) (*quoting United States v. Helton*, 471 F.Supp. 397, 399 n.1 (S.D.N.Y. 1979)); *see also United States v. Donahue*, 560 F.2d 1039, 1042 (1st Cir. 1977) ("[t]he same rule applies with equal force to representation of two or more defendants by members of the same law firm."). *Cf. Zuck v. Alabama*, 588 F.2d 436, 438 (5th Cir. 1979) (ineffective assistance found where "[t]he law firm which served as counsel to Zuck in his murder trial also represented, in an unrelated civil matter, the state prosecutor who tried Zuck."); Fed.R.Crim.Pro. 44(c) ("[w]henever two or more defendants have been jointly charged . . . and are represented by . . . retained or

end result on these facts is the same: Leaphart was actively involved in the defense of both to the extent that a conflict of interest was clearly established.

Although multiple representation is the paradigm context in which conflict of interest claims arise,[6] a finding of multiple representation alone does not establish ineffective assistance of counsel. *Foxworth v. Wainwright*, 516 F.2d 1072 (5th Cir.1975). The conflict must be shown to be actual, not speculative, before it will cause representation to fail Sixth Amendment standards. *Baty v. Balkcom*, 661 F.2d at 397. "An actual conflict of interest occurs when a defense attorney places himself in a situation 'inherently conducive to divided loyalties.'" *Zuck v. Alabama*, 588 F.2d 436, 439 (5th Cir.1979) (*quoting Castillo v. Estelle*, 504 F.2d 1243, 1245 (5th Cir.1974)); *see also Baty v. Balkcom*, 661 F.2d at 397 ("[a]n actual conflict of interest exists if counsel's introduction of probative evidence or plausible arguments that would "significantly benefit one defendant would damage the defense of another defendant whom the same counsel is representing.").

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appointed counsel who are associated in the practice of law, the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of his right to the effective assistance of counsel, including separate representation."), *construed in Ross v. Heyne*, 638 F.2d at 983 ("[t]he Supreme Court's proposal of this rule indicates its recognition that the potential constitutional problems attendant to multiple representation are present when different attorneys from the same legal partnership represent co-defendants with conflicting interests."); *ABA Code of Professional Responsibility* DR 5-105(D). Further, the Supreme Court of Georgia, exercising its supervisory role over the Bar, has adopted a mandatory rule in death penalty cases that co-defendants must be provided with separate and independent counsel. *Fleming v. State*, 264 Ga. 90, 270 S.E.2d 185 (1980). This rule applies with equal force to representation by a single attorney or by members of the same law firm. *Id.* at 188 n.7.

[6] *See Cuyler v. Sullivan*, 446 U.S. at 348, 100 S.Ct. at 1718 ("[a] possible conflict of interest inheres in almost every instance of multiple representation"); *United States v. Alvarez*, 580 F.2d 1251, 1254 (5th Cir. 1978).

In this case, the fundamental issue, as perceived by counsel, was not that of guilt, but of culpability. Upon the habeas corpus hearing Leaphart testified at length concerning the evidence supporting Burger's lesser degree of culpability for the murder as compared to Stevens'.[7] Summarized, the evidence was that at the time the crime was committed Burger was seventeen; Stevens was twenty. Burger has an I.Q. of 82 and possible brain damage. Stevens appeared to be the leader in their relationship; Burger the follower. Stevens planned and initiated the robbery of the victim; Burger followed his instructions. Stevens actually committed the robbery; Stevens made the victim undress; Stevens forced the victim to perform oral sodomy on Stevens; Stevens anally sodomized the victim; Stevens tied the victim up and forced him to get in the trunk of the cab. Stevens told Burger they would have to kill him; Burger said he didn't want to kill him. Stevens told Burger they would have to get rid of the cab by driving it into the pond; Stevens ordered Burger to drive the cab with the victim locked in the trunk into the pond. Burger drove the cab and the victim into the pond. In short, the essence of Burger's defense was that he was less culpable than Stevens.

In such a situation, any evidence or arguments made by counsel in Burger's behalf would, by the very nature of Burger's defense, damage Stevens. An actual conflict of interest between Burger and Stevens is thus apparent. Stated differently, Burger's interests were drastically adverse to those of Stevens.

> If a defense attorney owes duties to a party whose interests are adverse to those of the defendant, then an actual conflict of interest exists. The interests of the other client and the defendant are sufficiently adverse if it is shown that the attorney owes a duty to

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[7] THC at 20-23.

> the defendant to take some action that could be detrimental to his other client.
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> *Zuck v. Alabama*, 588 F.2d at 439.

The course of Burger's state court proceedings illuminates the duty owed him by Leaphart to take actions that could be detrimental to Stevens. First, Leaphart did not at any time in his representation of Burger offer Burger's testimony against Stevens in exchange for a sentence less than the death penalty for Burger.[8] *See Baty v. Balkcom*, 661 F.2d at 397 n. 12 ("[p]lea bargains are perhaps the most obvious example of the manifest effects of a conflict of interest at pretrial proceedings."); *see also Fleming v. State*, 246 Ga. 90, 270 S.E.2d 185, 189 (1980) (Bowles, J., concurring) ("[n]o two defendants share equal responsibility for a crime. Usually one is more culpable than the other or for any number of reasons has a greater degree of responsibility for what occurred. One may also be more entitled to leniency based on such factors as age, intelligence, motive, background, previous conduct or record, etc. Common counsel eliminates any practical possibility of plea bargaining."). Second, at Burger's trial Stevens was not called as a witness by the defense. If Stevens had been called by the state, Leaphart would

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[8] At the federal habeas hearing, Leaphart testified that he had not, at any time during his representation of Burger, discussed with the district attorney the possibility of Burger's testifying against Stevens in return for a lighter sentence. THC at 38-39. When further questioned about plea negotiations in Burger's case, Leaphart testified that he had engaged in plea negotiations, but that "*during the first trial* [the district attorney] refused to discuss it in any terms." THC at 65 (emphasis supplied). From this account, it appears that plea negotiations were entered into in this case; that Leaphart never offered Burger's testimony against Stevens; and that, after Burger's first trial had begun, the district attorney refused to discuss a plea on whatever terms Leaphart had offered, presumably not the terms of Burger's testifying against Stevens since Leaphart testified he did not at any time make such an offer. Thus, appellant's argument that no *pretrial* conflict of interest could have arisen due to the district attorney's refusal to plea bargain is contradicted by the record.

have been placed in the untenable position of cross-examining his own client. Finally, Leaphart prepared the briefs for both Burger and Stevens on each defendant's second appeal to the Supreme Court of Georgia. In Burger's brief, Leaphart does not argue that he was the less culpable party, although the scope of the Supreme Court of Georgia's appellate review in capital cases includes a consideration of whether the "sentence of death is excessive or disproportionate to the penalty in similar cases, considering both the crime and the defendant." O.C.G.A. § 17-10-35(c)(3) (1982), formerly Ga.Code Ann. § 27-2537(c)(3) (1933).

Once an actual conflict of interest is shown, without further inquiry, prejudice to the defendant is presumed. *Westbrook v. Zant*, 704 F.2d 1487, 1499 (11th Cir. 1983). "It is well established that when counsel is confronted with an actual conflict of interest, prejudice must be presumed, and except under the most extraordinary circumstances, the error cannot be considered harmless." *Baty v. Balkcom*, 661 F.2d at 395 (*quoting Turnquest v. Wainwright*, 651 F.2d 331, 334 (5th Cir. 1981)). The rationale for dispensing with the requirement of a showing of prejudice in conflict of interest cases "becomes apparent when one considers the nigh impossible task of making a meaningful qualitative analysis of trial counsel proficiency, in a case involving divided loyalties, from an examination of the transcript alone." *Johnson v. Hopper*, 639 F.2d 236, 239 (5th Cir. Unit B 1981). The degree to which counsel's strategic decisions and performance throughout the course of his representation are affected by an actual conflict of interest subtly pervading the whole of the defense may not be manifested in his conduct at trial alone. "[T]he sixth amendment requires that a defendant may not be represented by counsel who might be tempted to dampen the ardor of his defense in order to placate his other client. The fact that a particular lawyer may actually resist the

temptation is of no moment." *Zuck v. Alabama*, 588 F.2d at 440.

In light of this precedent it is clear that the presumption of prejudice arising from an actual conflict of interest cannot be overcome by evidence that counsel did, in fact, vigorously pursue one client's defense to the detriment of the other at trial. Although the factual consent of the extraordinary circumstances in which the error of representing actually conflicting interests is considered harmless has not been delineated by this Court, it is apparent that a showing of no adverse effect upon counsel's performance at trial or no impairment of his client's defense does not constitute such a circumstance.

Thus, accepting the district court's findings, those findings having been adopted by the majority in this case, that Leaphart "in no way tailored his strategy toward protecting Stevens" at Burger's trial, and that the trial record "shows considerable effort to gain mercy for petitioner by portraying Stevens as the chief architect of the crime," the presumption of prejudice from the actual conflict of interest between Burger and Stevens remains. Further, the actual conflict of interest between Stevens and Burger was not limited to Burger's trial, but permeated the entire course of Burger's state court proceedings. Once Burger established that an actual conflict of interest was present, whether at pretrial plea negotiations, trial or on appeal, and that his counsel actively represented both interests, his claim of ineffective assistance of counsel was complete.

I turn now to Burger's claim that he was denied the effective assistance of counsel because his counsel failed to present *any* evidence in mitigation, or otherwise, at either of his two sentencing proceedings. In *Stanley v. Zant*, 697 F.2d 955, 962 (11th Cir.1983) this Court rejected a claim that failure to present any mitigating evidence at the sentencing proceeding in addition to that presented at the guilt phase of the trial constituted per se ineffective assistance of counsel. Although, unlike

Stanley's attorney, Burger's attorney did not present *any* evidence during either the guilt or two sentencing phases, it is not necessary to articulate a per se rule of ineffectiveness in this case as "application of general principles governing effectiveness of counsel to the specific context of a capital sentencing proceeding," *id.*, demonstrates the ineffectiveness of Burger's counsel.

Counsel's duty of effective representation continues into the sentencing phase of his client's trial. *King v. Strickland*, 714 F.2d 1481, at 1491 (11th Cir.1983).

> The sentencing phase of any case regardless of the potential punishment, is 'the time at which for many defendants the most important services of the entire proceedings can be performed.' ABA Standard on Criminal Justice, Sentencing Alternatives and Procedures § 5.3(e). The special importance of the capital sentencing proceeding gives rise to a duty on the part of defense counsel to be prepared for that crucial phase of the trial. *Stanley v. Zant*, 697 F.2d at 963.

"At the heart of the duty of effective representation is the independent duty to investigate and prepare." *Goodwin v. Balkcom*, 684 F.2d 794, 805 (11th Cir.1982). In *Washington v. Strickland*, 693 F.2d 1243 (5th Cir. Unit B 1982) the en banc court delineated the content of this duty to investigate:

> A strategy chosen without the benefit of a reasonably substantial investigation into all plausible lines of defense is generally based upon counsel's professional assumptions regarding the prospects for success offered by the various lines. The cases generally conform to a workable and sensible rule: when counsel's assumptions are reasonable given the totality of the circumstances and when counsel's strategy represents a reasonable choice based upon those

> assumptions counsel need not investigate lines of defense that he has chosen not to employ at trial.
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> In sum, an attorney who makes a strategic choice to channel his investigation into fewer than all plausible lines of defense is effective so long as the assumptions upon which he bases his strategy are reasonable and his choices on the basis of those assumptions are reasonable. *Id.* at 1255, 1256 (footnotes omitted).

"An attorney may proceed absent a reasonable investigation into all potential lines of defense, but he does so at his peril." *Stanley v. Zant*, 697 F.2d at 966. Finally, once a showing of ineffective assistance of counsel due to counsel's failure to investigate has been made, the second prong of *Washington v. Strickland* requires that prejudice from this error be demonstrated. *Id.* at 1258.

The district court found that Leaphart's investigation into available mitigating evidence consisted solely of conversations with Burger's mother. Although it is unclear what the content of those conversations, as relating to mitigating evidence concerning Burger's background outside of Wayne County, Georgia, and the identity of possible character witnesses, was found to be, the district court concluded that Leaphart made "adequate if hardly ideal inquiries," and that his "investigation appears to meet at least minimal professional standards." Clearly by no stretch of the imagination could Leaphart's investigation be characterized as reasonably substantial. Since Leaphart failed to conduct a reasonably substantial investigation into available mitigating evidence, in order to be effective his choice not to investigate must have been a reasonable strategic decision based upon reasonable assumptions. Three reasonable assumptions on which Leaphart's strategy not to substantially investigate available mitigating evidence have been proffered: 1) that Leaphart's theory of defense, or strategy, was to make

the state prove its case; 2) that, if mitigating evidence had been offered at Burger's sentencing proceedings, Leaphart would have lost the right to opening and closing argument; and 3) that Leaphart chose to rely in closing on the argument that Burger had never been in trouble before, an argument which would have been undercut by an investigation into Burger's background. None of these strategies, and the assumptions on which they are based, withstand scrutiny for reasonableness.

Leaphart testified concerning his strategy or theory of defense in Burger's case:

> Well, of course, my theory of defense was of course trying to make the District Attorney prove his case. And my theory of defense was to—well, that in effect, in essence what it was. And, use whatever rules of evidence and to prevent him from doing so.[9]

And, specifically concerning the second trial solely on the issue of penalty, Leaphart again testified that he "[f]elt that case should have been tried on the facts and make the District Attorney—I say make him, use whatever rules of evidence to exclude those harmful facts." [10] The law provides that the state must prove its case, whether defense counsel is present or not. Relying on the state's case is not a "strategy" for the defense, but instead reflects an abandonment of counsel's obligation to develop a case for his client. This proffered strategy is tantamount to no strategy at all, and reliance on such a strategy, especially in the context of a capital sentencing proceeding, as an alternative to substantially investigating available mitigating evidence is patently unreasonable.

Second, Leaphart testified that he made a decision not to offer any evidence in mitigation in order to preserve

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[9] THC at 18.

[10] THC at 52.

his right to opening and closing arguments. Again, the basic assumption on which this strategy was based is patently unreasonable. O.C.G.A. § 17-10-2(a) & (c) (1982), formerly Ga.Code Ann. § 27-2503(a) & (c) (1933), provide for the conduct of sentencing proceedings in capital cases: "The district attorney shall open and the defendant or his counsel shall conclude the argument." The presentation of evidence by the defendant at a capital sentencing proceeding in no way affects this division of argument between the state and the defense. In fact, this procedure was followed at Burger's sentencing proceedings: the district attorney opened and defense closed final arguments to the jury. Leaphart simply failed to inform himself of basic Georgia criminal procedure in sentencing proceedings. *Cf. Young v. Zant*, 677 F.2d 792 (11th Cir.1982). No strategy based on such a false assumption is reasonable. The district court clearly erred in concluding otherwise.

The district court found that Leaphart's failure to substantially investigate available mitigating evidence was based on a strategic choice to rely in closing argument on the "major argument" in Burger's behalf that he had no prior record of violent crime and had never been in trouble before. As it relates to Burger's second sentencing proceeding, this finding is contradicted by the record: at no point in his closing argument did Leaphart mention the lack of evidence that Burger had a record or had been in trouble before. Instead, Leaphart's closing argument at the second sentencing proceeding argued Burger's lack of culpability as compared to Stevens', and concluded with the plea for mercy. Neither argument would have been undercut by the presentation of humanizing evidence concerning Burger's background.

In conclusion, Leaphart's decision not to substantially investigate available mitigating evidence was not a reasonable strategic choice, and thus his failure to investigate constituted ineffective assistance of counsel.

The inquiry does not end with a finding of ineffective assistance. Burger may prevail only if he shows both a denial of effective assistance and actual prejudice to the course of his defense. *Washington v. Strickland*, 693 F.2d at 1258. Under any standard, in this case prejudice is apparent. *See Douglas v. Wainwright*, 714 F.2d 1532 at 1556-58 (11th Cir.1983).

At the federal habeas hearing, Burger offered the testimony of his mother and numerous affidavits concerning his troubled childhood and background. Summarized, this evidence was that Burger's parents had been married when his mother was fourteen and his father was sixteen. His parents divorced when he was a child. Neither parent wanted Burger and his childhood was spent shuffled between the two. His father threw him out of the house; his mother sent him back to live with his father. Burger's mother remarried. Burger's stepfather beat Burger, and beat Burger's mother in his presence; Burger's stepfather involved him in drugs and alcohol when he was eleven years old. Burger's mother and stepfather moved from Indiana to Florida. Burger was sent to live with his father. Burger's father beat him and refused to have anything to do with him. Burger ran away and hitchhiked to Florida to live with his mother, selling his shoes to buy food along the way. When Burger arrived barefoot in Florida his stepfather told him he could not stay with them. Burger's mother told the juvenile authorities that she didn't want him, and to send him back to his father in Indiana. When Burger arrived in Indiana, his father locked him out of the house. Burger was taken in by a neighbor, as he had nowhere else to go. The clinical psychologist who examined Burger testified at a motion hearing that Burger had an I.Q. of 82 and possible brain damage.

It is absolutely astounding to me that none of this evidence was ever presented to Burger's juries. The district court found that although the affidavits of the character witnesses supplied by Burger at the hearing

do "contain references to a difficult childhood which might have created some sympathy for Mr. Burger," they also contained references to drug abuse, juvenile probation and violence. However, the thrust of the character testimony offered by Burger was not what Leaphart assumed without investigating, that Burger was a good boy and went to church, but that Burger's personality and motivation could be explained by his stormy and unhappy childhood. Although this is precisely the kind of humanizing evidence that "may make a critical difference, especially in a capital case," Leaphart failed to make a substantial investigation into its use. *Stanley v. Zant*, 697 F.2d at 969. Leaphart testified that "[I] did not have any knowledge of any witnesses that—potential witnesses that I thought would have benefited him. Had I known or had knowledge of any, I would—certainly would have used them."[11] The prejudice to Burger from counsel's failure to substantially investigate available mitigating evidence and present it at either of his capital sentencing proceedings lies in the alternative chosen by counsel: to present no evidence at all. On the basis of the state's case alone, two sentencing juries recommended the death penalty.

Failure to present this substantial, available mitigating evidence meets the prejudice prong of *Washington v. Strickland*, 693 F.2d at 1263-62, showing that "the petitioner suffered actual and substantial detriment to the conduct of his defense."

For these reasons, I would REVERSE the district court's finding that Burger was afforded the effective assistance of counsel during his state court proceedings and REMAND this case to the state court for a trial with Burger being represented by conflict-free and competent counsel.

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[11] THC at 44.

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 81-7419

CHRISTOPHER A. BURGER, PETITIONER-APPELLEE,
CROSS-APPELLANT

v.

RALPH KEMP, Warden, Georgia Diagnostic and Classification Center, RESPONDENT-APPELLANT,
CROSS-APPELLEE

Feb. 5, 1985

Appeals from the United States District Court
for the Southern District of Georgia

ON REMAND FROM THE SUPREME COURT
OF THE UNITED STATES

Before VANCE and JOHNSON, Circuit Judges, and ALLGOOD*, District Judge.

PER CURIAM:

Our previous consideration of the merits of this case resulted in reversal of the district court's grant of a writ

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* Honorable Clarence W. Allgood, U.S. District Judge for the Northern District of Alabama sitting by designation.

of habeas corpus setting aside petitioner's death sentence. *Burger v. Zant*, 718 F.2d 979 (11th Cir.1983). In reaching our decision we adopted the district court's opinion, *Blake v. Zant*, 513 F.Supp. 772 (S.D.Ga.1981), with respect to three issues, including Burger's claim that he had been denied effective assistance of counsel.

The Supreme Court granted certiorari limited to one aspect of that issue, *i.e.*, Burger's claim that his trial counsel failed to investigate, prepare or present evidence for the sentencing phase of his capital trial. The Court concluded that the district court had apparently made a mistake in assessing the evidence on that aspect of the ineffectiveness of counsel issue. *Burger v. Zant*, —— U.S. ——, 104 S.Ct. 2652, 81 L.Ed.2d 360 (1984). It therefore vacated and remanded to this court for reconsideration, particularly in light of *Strickland v. Washington*, 466 U.S. ——, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). —— U.S. at ——, 104 S.Ct. at 2653.

This court retained jurisdiction but remanded to the district court instructing it to extend or revise its findings and, if appropriate, its conclusions and judgment. *Burger v. Zant*, 741 F.2d 1274 (11th Cir.1984). On remand the district court reexamined Burger's claim and on October 10, 1984, entered its order holding the same to be without merit. A copy of the district court's order is made an appendix to this opinion. Following entry of the district court's order we allowed counsel to supplement their prior briefs.

Upon reconsideration, we again adopt the appended order of the district court as our own opinion.

Our previous reversal of the district court's grant of the writ was based on the so called *Stephens* issue. 718 F.2d 981, 982. That issue is no longer before us. On the issue presently before us we affirm the district court's holding that Burger's petition is without merit. Accordingly, we again remand to the district court with instructions that the writ be denied.

REMANDED with instructions.

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA BRUNSWICK DIVISION

CV280-114

CHRISTOPHER BURGER, PETITIONER

v.

WARDEN ZANT, ET AL., RESPONDENTS

ORDER

On limited remand from the Eleventh Circuit Court of Appeals, this Court has before it the task of examining petitioner Christopher Burger's claim that he received ineffective assistance of counsel at his second capital sentencing trial. At that trial, petitioner received a sentence of death.

I. *Background*

Mr. Burger's crimes, trials, appeals and habeas corpus proceedings are detailed elsewhere in the record of this case. *See Burger v. State*, 242 Ga. 28, 247 S.E.2d 834 (1978) (murder conviction affirmed, sentence vacated, case remanded for resentencing), *Burger v. State*, 245 Ga. 458, 265 S.E.2d 796 (1980) (death sentence affirmed), *cert. denied*, 448 U.S. 913, 101 S.Ct. 31, 65 L.Ed.2d 1175 (1980), *Blake v. Zant*, 513 F.Supp. 772, 787-803 (S.D.Ga.1981) (writ denied as to conviction but granted as to death sentence), *rev'd*, *Burger v. Zant*, 718 F.2d 979 (11th Cir.1983), *rehr'g en banc denied*, 726 F.2d 755 (11th Cir.1984), *vacated*, *Burger v. Zant*, —— U.S. ——, 104 S.Ct. 2652, 81 L.Ed.2d 360 (1984) (remanded with instructions), *Burger v. Zant*, 741 F.2d 1274 (11th Cir.1984) (limited remand to district court).

Previously, this Court concluded, *inter alia*, that petitioner was not denied effective assistance of counsel at his second sentencing trial. The Eleventh Circuit affirmed this Court as to this issue and adopted this Court's opinion as its own. *Burger v. Zant*, 718 F.2d at 981. On appeal, the United States Supreme Court vacated the opinion of the Eleventh Circuit and instructed it "to reconsider the effectiveness of counsel's assistance at petitioner's second sentencing and for further consideration in light of *Strickland v. Washington*, 466 U.S. —— [104 S.Ct. 2052, 80 L.Ed.2d 674] (1984)." 466 U.S. ——, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The Supreme Court also noted that this Court may have mistaken the first sentencing transcript for the second sentencing transcript when it considered the reasonableness of counsel's decision not to present character evidence to the resentencing court.

Thereafter, the Eleventh Circuit remanded the case to this Court, with instructions to "address the matter to which specific reference was made by the Supreme Court[.]" 714 F.2d at 1275. The court of appeals also stated that this Court "is not limited to that question and shall make such findings as it deems appropriate in light of the Supreme Court's action." *Id.* at 1275.

II. *Conclusion*

In its original decision, this Court examined petitioner's "ineffective assistance" argument and enumerated six claims meriting discussion. 513 F.Supp. at 795. In light of the standards announced in *Washington*, this Court affirms its earlier decision as to claims two through four, as well as claim six; they provide no grounds for habeas relief. Claim one will be reexamined *infra*.

A. *Failure to Present Mitigating Evidence*

Turning to petitioner's fifth claim—that his counsel was ineffective because he failed to present mitigating

evidence to the sentencing jury—the Court reviews the standards articulated in *Washington, supra*, and *United States v. Cronic*, —— U.S. ——, 104 S.Ct. 2039, 80 L.Ed. 2d 657 (1984). In *Washington*, the Supreme Court

> [e]stablished a two-prong test for analyzing . . . [ineffective assistance] challenges. First, the defendant must establish that his counsel's performance "fell below an objective standard of reasonablness." *Id.* at ——, 104 S.Ct. at 2065. Once that threshold is crossed, the defendant must then demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at ——, 104 S.Ct. at 2068.

Green v. Zant, 738 F.2d 1529, 1536 (11th Cir.1984) (hereafter, *Green*); *see also Smith v. Wainwright*, 741 F.2d 1248 (11th Cir.1984); *Douglas v. Wainwright*, 739 F.2d 531, 533 (11th Cir.1984); *Boykins v. Wainwright*, 737 F.2d 1539 (11th Cir.1984); *Solomon v. Kemp*, 735 F.2d 395 (11th Cir.1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome [of the trial]." *Boykins*, at 1543; quoting *Washington*, 104 S.Ct. at 2068. "Furthermore, a defendant must satisfy both the performance and prejudice prongs to successfully demonstrate an ineffective assistance claim. [*Washington*], at ——, 104 S.Ct. at 2069. *Chadwick v. Green*, 740 F.2d 897, 900 (11th Cir.1984) hereafter, *Chadwick*.[1] Courts need not address both of these com-

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[1] "In [*United States v.*] *Cronic*, [—— U.S. ——, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984)], the Court carved out a narrow exception to *Washington's* general rule that a defendant must demonstrate prejudice: a showing of prejudice is not necessary if there are "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified.' —— U.S. at ——, 104 S.Ct. at 2046; *see also Washington*, 466 U.S. at ——, 104 S.Ct. at 2065." *Chadwick*, 740 F.2d at 900. Examples of presumed prejudice would include cases where counsel was denied the right of effective cross-examination or where the defendant

ponents "if the defendant makes an insufficient showing on one." *Washington*, 466 U.S. at ——, 104 S.Ct. at 2069, 80 L.Ed. at 699.

In addition, the *Washington* court emphasized that "a substantial burden of proof rests on a defendant who advances such a claim; the challenged proceeding enjoys a 'strong presumption of reliability.' *Id.* at ——, 104 S.Ct. at 2069." *Boykins*, at 1543.

Finally, the Eleventh Circuit noted in *Green* that its

> [o]wn cases have established that '[e]ffective assistance does not mean errorless assistance, nor counsel judged ineffective by hindsight,' *Goodwin v. Balcom*, 684 F.2d [794,] 804 [(11th Cir.1982)], and our determination of whether petitioner was denied effective assistance 'must be based on the totality of circumstances in the entire record rather than on specific actions.' *United States v. Gibbs*, 662 F.2d 728, 730 (11th Cir.1981). Thus, even if we agree that any of petitioner's complaints against his counsel is well founded, this does not necessarily mean that constitutionally ineffective assistance has been established.

738 F.2d at 536.

In its original Order, this Court did review the resentencing record but erroneously cited to the transcript of the first sentencing trial. Accordingly, the Court will again review the second sentencing transcript.

As he did at the first sentencing trial, attorney Alvin Leaphart decided not to direct the jury's attention to character-oriented mitigation evidence at petitioner's second sentencing trial. (Federal Habeas Hearing Record, hereafter, "R." 34, 73). Although he was aware of the fact that Georgia permits a broad scope of mitigating evidence to be admitted at capital sentencing trials (R. 34, 36), it was Leaphart's judgment "that the best approach was . . . to argue the difference in [age between

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was denied counsel at a critical stage of the trial. *Id.* No such exception is evident in the instant case.

Burger and accomplice Thomas Stevens, as well as] the difference in their participation in the crime." (R. 34). In addition, he sought to "make the District Attorney prove his case[,]" (R. 18) by using the rules of evidence "to prevent [the prosecution] from doing so." (R. 18). The trial record reflects this strategy. *See, e.g.*, Tr. 65, 67, 95-6, 106-7, 109, 111, 117, 136, 180-181, 185-191.

Apparently in recognition of the range of evidence the State is permitted to present at sentencing trials (*see* note 6 *infra*), in addition to the strength of the evidence against his client, Leaphart decided to rely primarily on his closing argument to the jury. In his argument, Leaphart illuminated the acts of co-indictee Stevens [2] and minimized Burger's involvement in the murder and related crimes. He fully emphasized the fact that Stevens was twenty years old at the time of the crime, while Burger was only seventeen; that Stevens, the chief architect of the crimes, had considerable influence over petitioner. (Tr. 251, 253). He enumerated, as he did at the first sentencing trial, the series of criminal acts committed by Stevens in contrast to the relatively fewer acts committed by Burger, who "was only following Stevens." (Tr. 250-255).

Next, Leaphart attempted to stimulate the jurors' religious sensitivities. (Tr. 256). He also argued that an "eye for an eye" was a notion popular with the people of Moses and of the old testament, but not with the people of today.[3] (Tr. 257-258).

Leaphart concluded his closing argument by re-emphasizing the contrast between the acts of Stevens and Burger, then asking the jury "[w]hat would Jesus Christ do if he were sitting in our shoes today?" (Tr. 259).

The outline above reflects the best strategy Leaphart felt was available to him. Interviews with Burger (R.

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[2] Stevens and Burger were tried separately.

[3] The obverse side of this coin was applied by the prosecutor in *Cape v. Francis*, 741 F.2d 1287, 1301 n.15 (11th Cir. 1984).

37), Burger's mother (R. 37, 44) and an attorney who had befriended Burger and his mother (R. 44), in addition to his consultation with a psychologist[4] (R. 44, 50) and review of psychologists' reports obtained through Burger's mother (R. 35-36, 44), convinced Leaphart that a more exhaustive investigation into Burger's background would not be a profitable pursuit.[5] He also concluded that presenting background and character evidence to the sentencing jury would have been at best unproductive (R. 34, 52), and at worst, harmful to his client (R. 73).

Leaphart decided to keep his client off the stand for a number of reasons. He testified that he was not able to keep Burger from talking about his crime to others. (R. 65). He believed that Burger enjoyed talking about the crime, *id.*, and he feared that petitioner would gloat about it on the stand. (R. 66). He did not believe that Burger's

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[4] The psychologist on whom Leaphart relied indicated that he would not be able to provide helpful testimony. (R. 50-51). Moving the trial court for appointment of additional psychiatric study would have been counterproductive, according to Leaphart, because he believed that the state court would have sent his client to a state hospital—one which, according to Leaphart, had a reputation for producing reports favorable to the prosecution. (R. 51).

[5] Q. Did you make any attempt to talk to the other people that he had lived with during his life?

A. I couldn't—didn't know who they were. I knew that [Burger] had been in wherever he had come from to go in the Army. He had been—he had lived there. And, then his mother and father had separated at an early age as I recall. He was down in Florida for a while. Had gotten in some trouble down in Florida and then he went back up North where he lived and got in some trouble up there. And, then he ended up in the Army. And, very basically, I couldn't find anything in Mr. Burger's background which I felt would be helpful. You know, I could have put his mother up, I'm sure. And, she could have said some nice things about him. But, my feeling was that a lukewarm witness would have without any real thing to say would have possibly been harmful. And, I felt—I just decided not to do it.

(R. 38).

mother would be able to provide testimony sufficiently useful to warrant calling her to the stand. "[S]he could not add anything . . . other than being a mother and saying I don't want you to put my child in jail, or in the electric chair." (R. 68). He also feared that during cross-examination she would disclose unfavorable information about her son. *Id.*

In *Cape v. Francis*, 741 F.2d 1287 (11th Cir.1984), another Georgia state prisoner under sentence of death also sought habeas relief by alleging, *inter alia*, that he received ineffective assistance of counsel at the penalty stage of his trial.

The Eleventh Circuit did

> [n]ot detect any semblance of ineffectual representation during the penalty stage of the trial to support Cape's charge that his lawyer did not present sufficient mitigating evidence. Counsel investigated potential mitigating evidence and presented that which he felt would reflect favorably to his client. The mere fact that other witnesses might have been available or that other testimony might have been elicited from those who testified is not sufficient ground to prove ineffectiveness of counsel.

Id. at 1301.

It is true Cape's counsel presented some mitigating evidence while in the instant case petitioner's counsel presented no mitigating evidence. It is also true, however, that Leaphart's conversations with Burger, Burger's mother and family friend, together with his study of psychologists' reports, indicated to him that further investigation into this area would have been fruitless. Furthermore, and especially in light of his perception of Burger's personality, Leaphart, who had represented other death penalty defendants (R. 30, 58-59), feared opening the door to needless illumination of contrary character evidence by the prosecution on cross-examination. This

Court's inquiry is therefore properly focused on the reasonableness of Leaphart's investigation and decision regarding this rejected strategy. In that regard,

> [s]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchangeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support *the limitations on investigation.* In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

Washington, 466 U.S. at ——, 104 S.Ct. at 2066, 80 L.Ed.2d at 695 (emphasis added). Further focusing on what "limitations on investigation" would be evaluated in assessing the reasonableness of an attorney's performance, the Supreme Court emphasized that

> [w]hen a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable. In short, inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions. See *United States v. DeCoster*, 624 F.2d [196] at 209-210 [(D.C.Cir. 1976)].

Washington, 466 U.S. at ——, 104 S.Ct. at 2066-2067, 80 L.Ed.2d at 696.

Leaphart testified that Burger never gave him the names of any witnesses that might have been helpful to

him at trial. (R. 63). Despite this, Leaphart did consult as mentioned above, with Burger's mother and volunteer "big brother," (R. 77) and reviewed reports written by Burger's former psychologists. He was unable to unearth background information sufficiently helpful to warrant further investigation, nor to sway his decision not to emphasize petitioner's character at the second sentencing trial.

Petitioner Washington, like petitioner Burger, also confessed to, *inter alia*, his involvement in the crimes of kidnapping and murder. Unlike Burger, Washington had pleaded guilty and relied on an earlier plea colloquy with the sentencing judge, who had commended Washington for taking responsibility for his crimes. In both cases, however, defense counsel were faced with evidence of their clients' confessions, the overwhelming strength of the evidence against their clients and aggravating circumstances surrounding the crimes. In preparing for the sentencing hearing in *Washington*, counsel spoke with the defendant's

> wife and mother, though he did not follow up on the one unsuccessful effort to meet with them. He did not otherwise seek out character witnesses for respondent. [cit]. Nor did he request a psychiatric examination, since his conversations with his client gave no indication that respondent had psychological problems.

466 U.S. at ——, 104 S.Ct. at 2057, 80 L.Ed.2d at 684. As in the instant case, Washington's "[c]ounsel decided to look no further for evidence concerning respondent's character and emotional state. That decision reflected [*inter alia*], trial counsel's sense of hopelessness about overcoming the evidentiary effect of respondent's confessions to the gruesome crimes." *Id.* The Supreme Court concluded that "[t]rial counsel could reasonably surmise from his conversations with [his client] that character and psychological evidence would be of little

help. . . . Restricting testimony on [Washington's] character to what had come in at the plea colloquy ensured that contrary character and psychological evidence and [Washington's] criminal history, which counsel had successfully moved to exclude, would not come in." 466 U.S. at ——, 104 S.Ct. at 2071, 80 L.Ed.2d at 701.[6] In

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[6] Within specified limits, Georgia prosecutors are permitted at capital sentencing trials to place the defendant's character in issue through his prior record or other criminal acts. "All aspects of [a convicted felon's] crime or crimes, his character and his attitude are admissible, subject to the applicable rules of evidence regarding reliability, to guide the fact finder in determining appropriate sentence. *See Lockett v. Ohio*, 438 U.S. 586 [98 S.Ct. 2954, 57 L.Ed.2d 973 (1978)] [cits]; *Collier v. State*, [244 Ga. 553, 261 S.E.2d 364 (1979)]." *Fair v. State*, 245 Ga. 868, 268 S.E.2d 316, *cert. denied*, 449 U.S. 986, 101 S.Ct. 407, 66 L.Ed.2d 250, *reh'g denied*, 449 U.S. 1104, 101 S.Ct. 903, 66 L.Ed.2d 831 (1980); O.C.G.A. § 17-10-2. This may include "[a]ny lawful evidence which tends to show the motive of the defendant, his lack of remorse, his general moral character, and his predisposition to commit other crimes . . . subject to the notice provisions of the statute . . . [it] may [also] consist . . . of the defendant's attitude concerning his crime and the victim, the trier of fact's personal observation of the defendant, his conduct after incarceration and evidence of subsequent crimes." *Fair*, 245 Ga., at 873, 268 S.E.2d 316, quoted in *Zant v. Stephens*, 462 U.S. 862, —— n.22, 103 S.Ct. 2733, 2748 n.22, 77 L.Ed.2d 235, 256 n.22 (1983); *see also id.*, 462 U.S. at ——, 103 S.Ct. at 2743, 77 L.Ed.2d at 251 ("But the Constitution does not require the jury to ignore . . . possible aggravating factors [other than those specified in the sentencing statute] in the process of selecting . . . those defendants who will actually be sentenced to death."); *Id.*, 462 U.S. at —— n.17, 103 S.Ct. at 2743 n.17, 77 L.Ed.2d, at 251 n.17; *Godfrey v. Francis*, 251 Ga. 652, 660, 308 S.E.2d 806 (1983), *cert. denied*, —— U.S. ——, 104 S.Ct. 1930, 80 L.Ed.2d 475 (1984).

However, bad character evidence can be admitted only "[w]hen the defendant ha[s] been notified prior to trial that such evidence w[ill] be presented." *Brown v. State*, 235 Ga. 644, 649, 220 S.E.2d 922 (1975). The evidence must be geared toward providing " '[a]n *individualized* determination on the basis of the character of the individual and the circumstances of the crime.' [*Stephens*, 103 S.Ct. at] 2744 (emphasis in original)." *Ritter v. Smith*, 726 F.2d 1505,

addition, the mitigating evidence "[a]t most . . . show[ed] that numerous people who knew [Washington] thought he was generally a good person and that a psychiatrist and a psychologist believed he was under considerable emotional stress that did not rise to a level of extreme disturbance." *Id.*

In the instant case, counsel was faced with evidence of not only Burger's signed, but sworn confession, Tr 151-153), to participation in a gruesome crime. This evidence was bolstered by, *inter alia*, eyewitness and tangible evidence. The crime included petitioner's depraved act of asking the victim if he "was all right" before petitioner drowned him. Similar to the setting in *Washington*, counsel in the instant case was convinced from what he learned from his investigation that no productive result would obtain from further pursuing Burger's background, even in light of Leaphart's knowledge that Burger had come from a broken home, *see Griffin v. Wainwright*, 588 F.2d 1549, 1562 (M.D.Fla.1984), and that emphasizing character evidence would be the wrong strategy to employ. This judgment is not unreasonable, especially in light of the fact that calling a character witness to the stand is not without risk; there are, almost invariably, unknown poisons to be hatched out of the mud by way of

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1515 (11th Cir. 1984). In addition, the jury may not consider non-statutory aggravating circumstances unless it has found the existence of at least one statutory aggravating circumstance involved in the crime. *Stephens; Moore v. Zant*, 722 F.2d 640, 643-44 (11th Cir. 1984); *see also McCleskey v. Zant*, 580 F.Supp. 338, 390 (N.D. Ga. 1984). Such evidence must not be " 'constitutionally impermissible' or 'totally irrelevant to the sentencing process.' [*Stephens*, 103 S.Ct.] at 2747[.]" *Moore*, at 643. Furthermore, "[t]he defendant is accorded substantial latitude as to the types of evidence he may introduce." *Gregg v. Georgia*, 428 U.S. 153, 164, 96 S.Ct. 2909, 2921, 49 L.Ed.2d 859 (1976), citing *Brown; see also Raulerson v. Wainwright*, 732 F.2d 803 (11th Cir. 1984).

Nevertheless, there is no suggestion that State prosecutors may not elicit further information damaging to the defendant when cross-examining character witnesses called by a defendant. *See, e.g., Knighton v. Maggio*, 740 F.2d 1344, 1348 (5th Cir. 1984).

cross examination.[7] *See, e.g., Knighton v. Maggio*, 740 F.2d 1344, 1448 (5th Cir.1984) (defense counsel not ineffective when he made "the value judgment that the gain to be expected from the favorable testimony of family witnesses would not justify the risk of the potential harm from unfavorable testimony expected on cross-examination."). The reasonableness of the decision should be viewed not in hindsight, but primarily in light of the information supplied by the defendant. *Washington*, 466 U.S. at ——, 104 S.Ct. at 2067, 80 L.Ed.2d at 696.

In *Collins v. Francis*, 728 F.2d 1322 (11th Cir.1984), Collins contended that his

> counsel was ineffective because he failed to investigate for possible use at the sentencing phase of his trial any evidence of mitigating circumstances. [Collins] allege[d] that counsel failed to look into his character and the record and the background of his family. He also allege[d] that counsel failed to contact his relatives and friends regarding testimony they might have been able to give on the issues of guilt or punishment.

Id. at 1349.

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[7] In an affidavit submitted to this Court, petitioner's uncle attests that petitioner came from a broken home and that he was unwanted by his parents. He opined that Burger had a split personality. "Sometimes [Burger] would be a nice, normal guy, then at times he would flip out and would be violent over nothing." Affidavit of Earnest R. Holtcsclaw at 1-2; *see also* Affidavit of Cathy Russell Ray at 1 ("He had a hairtrigger temper. He would get mad and punch the walls. Once he broke his knuckles he got so made."). On one hand, a jury could react with sympathy over the tragic childhood Burger endured. On the other hand, since Burger's sanity was not in issue in this case, the prosecution could use this same testimony, after pointing out that petitioner was nevertheless responsible for his acts, to emphasize that it was this same unpredictable propensity for violence which played a prominent role in the death of Burger's victim. *See* note 6, *supra*. "[M]itigation . . ." after all, [m]ay be in the eye of the beholder." *Stanley v. Zant*, 697 F.2d 955, 969 & n.11 (11th Cir. 1983) (footnote omitted).

Collins pointed to affidavits from friends who said they would have vouched for his good character at the trial. Collins' counsel stated "that Collins never gave him the names of such friends; consequently, he made no attempt to uncover any[,]" (*id.*) and the habeas court gave credence to counsel's testimony. The Eleventh Circuit accepted this finding and this factor figured into its conclusion that Collins was not denied effective assistance of counsel.

In the instant case, this Court similarly finds that Burger did not provide his attorney with the names of those individuals apparently located by Mr. Leaphart's successors. It is true that petitioner's current attorneys were successful in finding other witnesses who could paint a tragic childhood background; it is also true that they were able to "elicit" a more compelling explanation of Burger's background from his mother than did Leaphart. (R. 74-87).[8] That post-death sentence attorneys with greater resources materialize to illuminate, through the use of hindsight, weaknesses in the strategy employed by pre-sentence attorneys equipped with comparatively fewer resources, was apparently recognized by the Supreme Court in *Washington*, when it emphasized that

> [j]udicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a de-

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[8] The *Collins* court also found significant the fact that counsel reasonably concluded that Collins' mother would not have made a favorable impact on the jury. In the instant case, Leaphart testified that after interviewing Burger's mother, he concluded that she would not have made any further impact on the jury except that degree of sympathy which might have been derived from her putative plea to the jury for mercy for her son. Furthermore, he did not deem it wise to risk possible negative consequences from using her testimony. The Court does not find credible her assertion, made in response to a question asked by a post-death sentence attorney, that Leaphart never asked her about Burger's background. (R. 76).

> fendant to second guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. *Cf. Engle v. Isaac*, 456 U.S. 107, 133-134, 71 L.Ed.2d 783, 102 S.Ct. 1558 [1574-1575] (1982).

Washington, 466 U.S. at ——, 104 S.Ct. at 2065, 80 L.Ed.2d at 694; see also *Stanley v. Zant*, 697 F.2d 955, 964 n. 7, *reh'g denied*, 706 F.2d 318 (11th Cir.1983); *Williams v. Maggio*, 679 F.2d 381, 392 (5th Cir.1982) (en banc).

As mentioned above, courts must accord "a heavy measure of deference to counsel's judgments" 466 U.S. at ——, 104 S.Ct. at 2066, 80 L.Ed.2d at 695, and pay heed to those instances where the defendant "has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful[.]" *Id.*, 466 U.S. at ——, 104 S.Ct. at 2066, 80 L.Ed.2d at 696. In such instances, "[c]ounsel's failure to pursue those investigations may not later be challenged as unreasonable." *Id.* Indeed,

> in his argument to the jury at the sentencing hearing, [Burger's] lawyer made the strategic choice to focus on policy considerations against the imposition of the death penalty rather than call attention to the character of the petitioner. We cannot discredit counsel's trial tactics in pursuing this course, taking into consideration the overwhelming evidence of guilt and the bizzare nature of the crime.

Cape v. Francis, 741 F.2d at 1301.

As was the Eleventh Circuit in *Cape*, this Court is "[m]indful of the many obstacles and pitfalls that confront lawyers in the defense of capital murder cases.

The responsibilities and pressures are awesome. In retrospect, one may always identify shortcomings." *Id.*[9]

Indeed,

> [e]ffective counsel in a given case may consider the introduction of character evidence to be contrary to his client's interest. In other cases he may consider it unlikely to make much difference. In certain cases he may conclude that although available testimony might be minimally helpful, it would detract from the impact of another approach that he considers more promising . . . [Counsel's] knowledge of local attitudes, his evaluation of the personality of the defendant and his judgment of the compatibility of the available testimony and the jury's impression of the

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[9] See *Burger v. Zant*, 718 F.2d at 992-994 (Johnson, J. dissenting). In his dissent, Judge Johnson faulted Leaphart for "mak[ing] a decision not to offer any evidence in mitigation in order to preserve his right to opening and closing arguments." *Id.* at 992. Judge Johnson concluded that "the basic assumption on which this strategy was based is patently unreasonable[,]" (*id.*), since in the sentencing phase of the process there is no right of the defendant to open and close argument following the state's presentation of its evidence. O.C.G.A. § 17-10-2(a) & (c) (1982) (In the sentencing phase, "[t]he district attorney shall open and the defendant or his counsel shall conclude the argument."). With respect, this Court must disagree with Judge Johnson's conclusion. In response to questions aimed at illuminating Leaphart's over-all knowledge and capabilities in handling criminal cases, Leaphart indicated that "[i]n the trial in the *original* [*i.e.*, guilt/innocence phase of the] case[,]" he felt that the presentation of witness testimony would not have been worth the loss of his ability to open and close during the final argument phase of the trial. (R. 67) (emphasis added). O.C.G.A. § 17-8-71 (1982) specifies that "[i]f the defendant introduces no evidence, his counsel shall open and conclude that argument to the jury after the evidence on the part of the state is closed." Where a defendant does present evidence, he loses his right to open and close. *See, e.g., Hubbard v. State*, 167 Ga.App. 32, 305 S.E.2d 849 (1983). In fairness to Judge Johnson, this Court recognizes that it incorrectly applied this distinction in its original Order. *See Blake v. Zant*, 513 F.Supp. at 798.

> defendant, his familiarity with the reactions of the trial judge under various circumstances, his evaluation of the particular jury, his sense of the 'chemistry' of the courtroom are just a few of the elusive, intangible factors that are not apparent to the reviewing court, but are considered by most effective counsel in making a variety of trial and pretrial decisions.

Stanley v. Zant, *supra*, 697 F.2d at 970.

In the instant case, it cannot be said that Leaphart's "[t]actical decision[] . . . amount[s] to ineffective assistance[, as it is not] so ill-chosen as to render the trial fundamentally unfair. [*Washington*, 466 U.S. at ——, 104 S.Ct. at 2067, 80 L.Ed.2d at 696]." *Solomon v. Kemp*, *supra*, 735 F.2d at 402. Furthermore, " 'counsel for a criminal defendant is not required to pursue every path until it bears fruit or until all available hope withers.' *Lovett v. Florida*, 627 F.2d 706 (5th Cir. 1980)." *Id.* This Court concludes that "[c]ounsel's strategy choice was well within the range of professionally reasonable judgments, and the decision not to seek more character . . . evidence that was already in hand was likewise reasonable." *Washington*, 466 U.S. at ——, 104 S.Ct. at 2071, 80 L.Ed.2d at 701.

Because petitioner's showing is insufficient as to the performance prong of the *Washington* test, it is not necessary to address the prejudice prong. *Washington*, 466 U.S. at ——, 104 S.Ct. at 2071, 80 L.Ed.2d at 702 ("[f]ailure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim.").

Accordingly, petitioner's claim that his counsel was ineffective because he failed to present mitigating evidence at his second sentencing trial is DENIED. "[On this particular claim, petitioner] has made no showing that the justice of his sentence was rendered unreliable by a breakdown in the adversary process caused by deficiencies in counsel's assistance." *Id.*

B. *Conflict of Interest*

Since an attorney's freedom from conflict of interest is an important consideration in any examination of his effectiveness (*see Burger v. Zant*, 718 F.2d at 987-991 (Johnson, J., dissenting), the Court will revisit its earlier conclusion. This claim is best analyzed by first examining what was and was not actually present in this litigation. As noted above, Burger and coindictee Stevens were tried separately. Each was represented by appointed counsel. Burger's counsel did employ a strategy adverse to Stevens' interests when he emphasized Stevens' greater culpability in the crime.

On the other hand, Stevens' counsel was also Leaphart's partner, Robert B. Smith. (R. 13-14). It is undisputed that the two lawyers made no attempt to construct a "Chinese Wall" between themselves. In fact, in varying degrees, they worked together on both cases at the trial and appellate levels. (R. 18, 40-41). Smith sat in with Leaphart on Burger's case, but Leaphart did not involve himself with Stevens' trial, which followed Burger's. (R. 18).

Leaphart was questioned on what effect, if any, his collaboration with Smith had on his resolve to represent Burger.

> THE COURT: Did you pull any punches in order to protect Stevens?
>
> A. No.
>
> THE COURT: If crucifying Stevens would have helped Burger, would you have done it?
>
> A. Yes, sir.
>
> Q. Did you do it?
>
> A. Didn't have the opportunity.

(R. 53).

As mentioned above, Leaphart did emphasize Stevens' greater culpability in the crime. He also investigated

Stevens to ascertain what, if anything, might be useful to his defense of Burger. (R. 54). In addition, he constantly attempted to plea bargain with the prosecutor in the case. (R. 65). However,

> A. [d]uring the first trial [the prosecutor] just flatly refused to even discuss it in any terms. And, then when we got it reversed on the sentence feature I continued to—in that time to try to negotiate with the—the district attorney about entering a plea, for Mr. Burger to serve a life sentence. And he insisted on trying it and insisted on seeking the death penalty.

Id.

The prosecutor's flat refusal to engage in plea bargaining is not surprising when viewed in light of the strength of the case against Burger. As mentioned above, this evidence included Burger's signed, sworn confession (Tr. 151-153), which was coupled with a *Miranda* waiver (Tr. 201-203), along with eyewitness and tangible evidence. In addition, there is no suggestion that this evidence was not available to be used against Stevens. This background provides suitable perspective to the following examination by petitioner's federal habeas attorney:

> Q. Mr. Leaphart, did at any time during the representation did you talk to the District Attorney about the possibility of Mr. Leaphart (sic) testifying against Mr. Stevens?
>
> A. You mean Mr. Burger?
>
> Q. Mr. Burger, excuse me.
>
> A. No.
>
> Q. There was no discussion of his testimony in exchange for a lighter sentence for Mr. Burger?
>
> A. No, sir.

(R. 38-39).

Since the prosecution "flatly refused to even discuss" plea bargaining, it follows that Leaphart would not have talked to the prosecutor about offering his client's testimony against Stevens.

Leaphart testified that at no time did he believe a conflict of interest to exist in the case during the trials and appeals. (R. 62). Finally, the conflict of interest issue was never raised at the trial level. (R. 15).

The standards for reviewing a conflict of interest claim are well settled.

> For a conflict of interest to cause representation to fail Sixth Amendment standards, the conflict must be actual, not speculative. *United States v. Alvarez*, 696 F.2d 1307, 1309 (11th Cir.1983), *cert. denied*, 461 U.S. 907, 103 S.Ct. 1878, 76 L.Ed.2d 809 (1983); *Baty v. Balkcom*, 661 F.2d 391, 395 (5th Cir. Unit B 1981), *cert. denied*, 456 U.S. 1011, 102 S.Ct. 2307, 73 L.Ed.2d 1308 (1982). Until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance. *Baty v. Balkcom, supra*, at 396.

United States v. Ard, 731 F.2d 718, 726-727 (11th Cir. 1984); *Westbrook v. Zant*, 704 F.2d 1487, 1499 (11th Cir.1983); *United States v. Mers*, 701 F.2d 1321, 1328 (11th Cir.), *cert. denied*, —— U.S. ——, 104 S.Ct. 481, 78 L.Ed.2d 679 (1983); see also *Barham v. United States*, 724 F.2d 1529 (11th Cir.1984) (not all conflicts are so egregious as to constitute a Sixth Amendment claim). Judge Johnson stated that Leaphart and Smith acted as one attorney; that Leaphart in effect represented both Burger and Stevens. 718 F.2d at 988. Setting aside the fact that Burger and Stevens received separate trials, the Court turns to *United States v. Carr*, 740 F.2d 339 (5th Cir.1984), where the Fifth Circuit stated that

> "[a]conflict of interest is present whenever one defendant stands to gain significantly by counsel ad-

> ducing probative evidence of advancing plausible arguments that are damaging to a codefendant whom counsel is also representing." [cits]. In assessing whether or not such conditions are present in a particular case the attorney representing both defendants "is in the best position professionally and ethically to determine when a conflict of interest exists. . . ." *Cuyler* [*v. Sullivan*], 446 U.S. [335] at 347 [100 S.Ct. 1708, 1717, 64 L.Ed.2d 333] [cits].

740 F.2d at 348.

The mere fact that the attorneys assisted each other in Burger and Stevens' cases does not convince this Court that a conflict of interest has been shown. Although it may be said that the two attorneys at times acted as one while each prepared for trial and appeal, any inducement of Leaphart to actively represent conflicting interests—"to pull any punches" in his representation of Burger—would be at best speculative, not actual. There has been no showing that Leaphart "made a choice between possible alternative courses of action, such as eliciting (or failing to elicit) evidence helpful to one client but harmful to the other." *Mers*, 701 F.2d at 1328. In fact, Leaphart testified that he neither felt nor recognized the existence of a conflict of interest when he represented Burger. (R. 62). Nor can it be said that the overlap of counsel, to the extent it existed, infected Leaphart's representation so as to constitute an "active representation of conflicting interests." *Cuyler v. Sullivan*, 446 U.S. 335, 350, 100 S.Ct. 1708, 1719, 64 L.Ed.2d 333 (1980).

Accordingly, the Court affirms its earlier conclusion that petitioner is not entitled to relief on this ground.

To summarize, petitioner's claim that his attorney provided ineffective assistance of counsel at the second sentencing trial in this case is without merit. In addition, no conflict of interest on the part of his attorney has been shown.

SO ORDERED, this 10 day of October, 1984.

/s/ B. Avant Edenfield
Judge
United States District Court
Southern District of Georgia

JOHNSON, Circuit Judge, dissenting:

I dissent from the majority's adoption of the district court order denying Burger's claim that he was deprived of effective assistance of counsel. A review of the record reveals that Burger was denied the effective assistance of counsel by both his appointed counsel's active representation of his co-indicteee's conflicting interest and his counsel's failure to present any evidence on his behalf at either of his two sentencing proceedings.

The general principles applicable to ineffective assistance of counsel claims were articulated in *Strickland v. Washington*, —— U.S. ——, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *See also King v. Strickland*, 748 F.2d 1462 (11th Cir.1984). To demonstrate that the assistance provided by counsel was so deficient as to require reversal, a defendant must make a two-pronged showing. First, he must demonstrate that his counsel made errors so serious that he was not functioning as the "counsel" guaranteed by the Sixth Amendment. *Id.* at 2064. Such errors must be outside the generous range given to "reasonable professional judgment." *Id.* at 2066. Second, the defendant must demonstrate that he was prejudiced by the deficient performance. To meet this portion of his burden, defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 2068. A court reviewing an ineffective assistance claim, however, must bear in mind that

> the ultimate focus of inquiry must be on the fundamental fairness of the proceeding. In every case the court should be concerned whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system relies on to produce just results.

Id. at 2069.

The Court in *Strickland v. Washington* also considered the showing that is required when a defendant argues that counsel was ineffective by reason of conflict of interest.[1] Where counsel breaches the duty of loyalty to his client, a limited presumption of prejudice applies. *Strickland v. Washington, supra,* 104 S. Ct. at 2067; *Cuyler v. Sullivan,* 446 U.S. 335 345-350, 100 S.Ct. 1708, 1716-1719, 64 L.Ed.2d 333 (1980). Prejudice is presumed if the defendant can demonstrate that counsel "actively represented conflicting interests" and "that an actual conflict of interest adversely affected his lawyer's performance." *Strickland v. Washington, supra,* 104 S.Ct. at 2067; *Cuyler v. Sullivan, supra,* 446 U.S. at 350, 348, 100 S.Ct. at 1719, 1718.

Turning first to Burger's conflict of interest claim, the record is clear that Burger's counsel actively represented both Burger and Stevens. Both Burger and Stevens were charged with and indicted for the murder of Roger Honeycutt. Both were appointed counsel by the trial court at approximately the same time. Burger's appointed counsel, Leaphart, and Stevens' appointed counsel, Smith, were partners in a two-partner law firm. At the federal habeas hearing, Leaphart testified that he interviewed both Burger and Stevens. Leaphart also testified that he assisted Smith in the preparation of Stevens' case and that Smith assisted him in the preparation of Burger's case. Both lawyers discussed the issues involved in each case and researched the law together.[2] Smith and Leaphart collaborated in preparing the briefs for both Burger and Stevens on each defendant's first appeal to the Supreme Court of Georgia; Leaphart testified that he "primarily" prepared the briefs for Burger and Stevens on the second appeal to the Supreme Court

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[1] The Sixth Amendment guarantee of effective assistance of counsel necessarily includes the guarantee of conflict-free counsel. *Glasser v. United States,* 315 U.S. 60, 70, 62 S.Ct. 457, 464, 86 L.Ed. 680 (1942); *United States v. Alvarez,* 580 F.2d 1251, 1254 (5th Cir. 1978).

[2] Transcript of Federal Habeas Corpus Hearing ("THC") at 18.

of Georgia.[3] The fee received by each attorney for representing each client was deposited in the law firm's corporate account. At no time in his representation of Burger did Leaphart or the trial court ever inform Burger of a possible conflict of interest.

Whether analyzed as a situation where one attorney, Leaphart, represented both Burger and Stevens,[4] or where one law firm represented both Burger and Stevens,[5] the

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[3] THC at 40-41.

[4] The warden-appellant argues that the conflict of interest cases relied upon by Burger are inapposite as involving the representation of multiple defendants by one attorney. Here, appellant contends, Burger and Stevens were represented by "separate" attorneys. This argument is contrary to the facts as reflected by the record. Leaving aside the fact that Leaphart and Smith were partners in the practice of law, the attorneys here were each active in the defense of the other's client and "seem to have viewed themselves as a defense 'team' acting on behalf of [both] of th accused." *United States ex rel. Sullivan v. Cuyler*, 593 F.2d 512, 515 (3d Cir. 1979), *rev'd on other grounds, Cuyler v. Sullivan*, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). Leaphart consulted confidentially with Stevens, aided in preparing his case for trial, and prepared the briefs for both of his appeals. "Whatever may have been the extent of each attorney's participation in the trial of the . . . defendants, we are satisfied that it was sufficient to establish that both attorneys represented [both] defendants." *Id.*

[5] "The same principles [governing Sixth Amendment conflict of interest claims] apply where the joint representation is by two members of the same firm." *Ross v. Heyne*, 638 F.2d 979, 983 (7th Cir. 1980) (*quoting United States v. Helton*, 471 F. Supp. 397, 399 n.1 (S.D.N.Y. 1979)); *see also United States v. Donahue*, 560 F.2d 1039, 1042 (1st Cir. 1977) ("[t]he same rule applies with equal force to representation of two or more defendants by members of the same law firm."). *Cf. Zuck v. Alabama*, 588 F.2d 436, 438 (5th Cir. 1979) (ineffective assistance found where "[t]he law firm which served as counsel to Zuck in his murder trial also represented, in an unrelated civil matter, the state prosecutor who tried Zuck."); Fed.R.Crim.P. 44(c) ("[w]henever two or more defendants have been jointly charged . . . and are represented by . . . retained or appointed counsel who are associated in the practice of law, the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of his

end result was that Leaphart was actively involved in the defense of both to the extent that a conflict of interest was clearly established.

Although multiple representation is the paradigm context in which conflict of interest claims arise,[6] a finding of multiple representation alone does not establish ineffective assistance of counsel. The conflict must be shown to be actual, not merely speculative, before representation will violate Sixth Amendment standards. *Baty v. Balkcom*, 661 F.2d 391, 397 (5th Cir. Unit B 1981). "An actual conflict of interest occurs when a defense attorney places himself in a situation 'inherently conducive to divided loyalties.'" *Zuck v. Alabama*, 588 F.2d 436, 439 (5th Cir.1979)) (*quoting Castillo v. Estelle*, 504 F.2d 1243, 1245 (5th Cir.1974)); *see also Baty v. Balkcom*, *supra*, 661 F.2d at 397 ("[a]n actual conflict of interest exists if counsel's introduction of probative evidence or plausible arguments that would significantly benefit one defendant would damage the defense of another whom the same counsel is representing.").

In this case the fundamental issue framed by counsel was not Burger's guilt but the extent of his culpability.

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right to the effective assistance of counsel, including separate representation."), *construed in Ross v. Heyne*, 638 F.2d at 983 ("[t]he Supreme Court's proposal of this rule indicates its recognition that the potential constitutional problems attendant to multiple representation are present when different attorneys from the same legal partnership represent co-defendants with conflicting interests."); *ABA Code of Professional Responsibility* DR 5-105(d). Further, the Supreme Court of Georgia, exercising its supervisory role over the Bar, has adopted a mandatory rule in death penalty cases that co-defendants must be provided with separate and independent counsel. *Fleming v. State*, 264 Ga. 90, 270 S.E.2d 185 (1980). This rule applies with equal force to representation by a single attorney or by members of the same law firm. *Id.* at 188 n.7.

[6] *See Cuyler v. Sullivan*, 446 U.S. at 348, 100 S.Ct. at 1718 ("[a] possible conflict of interest inheres in almost every instance of multiple representation"); *United States v. Alvarez*, 580 F.2d 1251, 1254 (5th Cir. 1978).

At the habeas corpus hearing, Leaphart exhaustively reviewed the evidence that the extent of Burger's culpability was less than that of Stevens.[7] In sum, this evidence was as follows. At the time the crime was committed, Burger was seventeen; Stevens was twenty. Burger has an I.Q. of 82 and possible brain damage. Stevens appeared to be the leader in their relationship; Burger was the follower. Stevens planned and initiated the robbery of the victim; Burger followed his instructions. Stevens actually committed the robbery; Stevens made the victim undress; Stevens forced the victim to perform oral sodomy on Stevens; Stevens anally sodomized the victim; Stevens tied the victim up and forced him to get in the trunk of the cab. Stevens told Burger they would have to kill him; Burger said he didn't want to kill him. Stevens told Burger they would have to get rid of the cab by driving it into the pond; Stevens ordered Burger to drive the cab with the victim locked in the trunk into the pond. Burger drove the cab and the victim into the pond. In short, the essence of Burger's defense was that he was less culpable than Stevens.

In this situation, any evidence or arguments made by counsel in Burger's behalf would, by the very nature of Burger's defense, damage Stevens. Such adversity in the interests of Leaphart's clients demonstrates that an actual conflict of interest existed. *See Zuck v. Alabama*, *supra*, 588 F.2d at 439 (adversity sufficient to demonstrate actual conflict of interest exists if "the attorney owes a duty to the defendant to take some action that could be detrimental to his other client").

The evidence provided by petitioner also demonstrates that this conflict "adversely affected his lawyer's performance." *Strickland v. Washington*, *supra*, 104 S.Ct. at 2052. On several occasions, Leaphart refrained from taking actions in support of Burger that would have been detrimental to Stevens. For example, at no time in his

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[7] THC at 20-23.

representation of Burger did Leaphart offer Burger's testimony against Stevens in exchange for a sentence less than the death penalty for Burger.[8] *See Baty v. Balkcom, supra*, 661 F.2d at 397 N. 12 ("[p]lea bargains are perhaps the most obvious example of the manifest effects of a conflict of interest at pretrial proceedings."); *see also Fleming v. State*, 246 Ga. 90, 270 S.E.2d 185, 189 (Bowles, J., concurring) ("[n]o two defendants share equal responsibility for a crime. Usually one is more culpable than the other or for any number of reasons has a greater degree of responsibility for what occurred. One may also be more entitled to leniency based on such factors as age, intelligence, motive, background, previous conduct or record, etc. Common counsel eliminates any practical possibility of plea bargaining."). The district attorney's disinclination to plea bargain did not stop Leaphart from "constantly attempting" to bargain for a life sentence; there is no reason why it should have deterred him from making the more attractive offer to Burger's testimony against Stevens. Moreover, at Burger's trial Stevens was not called as a witness by the defense. Finally, Leaphart prepared the briefs for both Burger and Stevens on each defendant's second appeal to

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[8] At the federal habeas hearing, Leaphart testified that he had not, at any time during his representation of Burger, discussed with the district attorney the possibility of Burger's testifying against Stevens in return for a lighter sentence. THC at 38-39. When further questioned about plea negotiations in Burger's case, Leaphart testified that he had engaged in plea negotiations, but that "*during the first trial* [the district attorney] refused to discuss it in any terms." THC at 65 (emphasis supplied). From this account, it appears that plea negotiations were entered into in this case; that Leaphart never offered Burger's testimony against Stevens; and that, after Burger's first trial had begun, the district attorney refused to discuss a plea on whatever terms Leaphart had offered, presumably not the terms of Burger's testifying against Stevens since Leaphart testified he did not at any time make such an offer. Thus, appellant's argument that no *pretrial* conflict of interest could have arisen due to the district attorney's refusal to plea bargain is contradicted by the record.

the Supreme Court of Georgia. In Burger's brief, Leaphart does not argue that he was the less culpable party, although the scope of the Supreme Court of Georgia's appellate review in capital cases includes a consideration of whether the "sentence of death is excessive or disproportionate to the penalty in similar cases, considering both the crime and the defendant." O.C.G.A. 17-10-35(c)(3) (1982), formerly Ga.Code Ann. 27-2537(c)(3) (1933).

Once a defendant has made the two showings required by *Strickland v. Washington*, *supra*, prejudice is presumed. 104 S.Ct. at 2067. *See also Westbrook v. Zant*, 704 F.2d 1487, 1499 (11th Cir.1983); *Baty v. Balkcom*, *supra*, 661 F.2d at 395 ("when counsel is confronted with an actual conflict of interest, prejudice must be presumed, and except under the most extraordinary circumstances, the error cannot be considered harmless") (*quoting Turnquest v. Wainwright*, 651 F.2d 331, 334 (5th Cir.1981)). Even accepting the district court's finding, adopted by the majority in this case, that Leaphart did not "tailor[] his [trial] strategy toward protecting Stevens," there is sufficient evidence of an actual conflict and of tangible adverse effect on Leaphart's performance establish a Sixth Amendment violation.[9]

Burger also argues that he was denied the effective assistance of counsel because Leaphart failed adequately to investigate possible mitigating evidence or to present *any* evidence, in mitigation or otherwise, at either of his two sentencing proceedings. Counsel's duty of effective representation continues into the sentencing phase of his

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[9] The district court appears to take the position that it would not be possible to make a full demonstration of prejudice of the type, for example, that is required for general ineffective assistance claims under *Strickland v. Washington*. Whether or not such a showing would be possible is not relevant, however, to the issue of conflict of interest. In conflict of interest cases, as noted above, a limited presumption applies on a showing of some "adverse effect" on the lawyer's performance, which has been amply demonstrated in the instant case.

client. *See Stanley v. Zant*, 697 F.2d 955, 963 (11th Cir. 1983) ("The special importance of the capital sentencing proceeding gives rise to a duty on the part of defense counsel to be prepared for that crucial phase of the trial."). At the core of the duty of effective representation is the "independent duty to investigate and prepare." *Goodwin v. Balkcom*, 684 F.2d 794, 805 (11th Cir.1982). To fulfill this obligation, counsel must make reasonable investigations or make a reasonable decision that makes further investigation unnecessary. *Strickland v. Washington*, 104 S.Ct. at 2066. An examination of the relevant facts suggests that Leaphart failed in both his duty of investigation and his duty of representation at the sentencing proceeding.

The district court found that Leaphart's investigation into available mitigating evidence consisted solely of conversations with Burger's mother and an attorney who had befriended her. Although the content of those conversations and the identity of possible character witnesses were not clear, the district court concluded that Leaphart made "adequate if hardly ideal inquiries" and that his "investigation appears to meet at least minimal professional standards." Such an investigation should not be characterized as reasonable or substantial. Moreover, even the scant amount of information which was unearthed through Leaphart's investigation was not presented in the proceeding itself. Nor can it be said that Leaphart's choice to curtail investigation and to present no evidence at the sentencing proceedings was a reasonable strategic decision based on reasonable assumptions. Leaphart has attempted to justify his approach by reference to three strategies or assumptions: 1) that Leaphart's theory of defense, or strategy, was to make the state prove its case; 2) that, if mitigating evidence had been offered at Burger's sentencing proceedings, Leaphart would have lost the right to opening and closing argument; and 3) that Leaphart chose to rely in closing on the argument that Burger had never been in trouble before,

which would have been undercut by an investigation into and testimony concerning Burger's background. Even conceding that broad range must be given to the operation of professional judgment, *Strickland v. Washington*, 104 S.Ct. at 2065-66, none of these strategies or assumptions withstand scrutiny for reasonableness.

Leaphart testified concerning his strategy or theory of defense in Burger's case:

> Well, of course, my theory of defense was of course trying to make the District attorney prove his case. And my theory of defense was to—well, that is in effect in essence what it was. And, use whatever rules of evidence and to prevent him from doing so.[10]

And, specifically concerning the second trial solely on the issue of penalty, Leaphart again testified that he "felt that case should have been tried on the facts and make the District Attorney—I say make him, use whatever rules of evidence to exclude those harmful facts." [11] The law provides that the state must prove its case, whether defense counsel is present or not. Relying on the state's case is not a "strategy" for the defense, but rather reflects an abandonment of counsel's obligation to develop a case for his client. This proffered strategy is tantamount to no strategy at all; and reliance on such a strategy in a capital sentencing proceeding, as an alternative to investigating and presenting available mitigating evidence, is patently unreasonable.

Second, Leaphart testified that he made a decision not to offer any evidence in mitigation in order to preserve his right to opening and closing arguments. Again, the basic assumption on which this strategy was based is patently unreasonable. O.C.G.A. 17-10-2(a) & (c) (1982), formerly Ga.Code Ann. 27-2503(a) & (c) (1933), provide for the conduct of sentencing proceedings in capital

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[10] THC at 18.

[11] THC at 52.

cases: "The district attorney shall open and the defendant or his counsel shall conclude the argument." The presentation of evidence by the defendant at a capital sentencing proceeding in no way affects this division of argument between the state and the defense. In fact, this procedure was followed at Burger's sentencing proceedings: the district attorney opened and the defense closed final arguments to the jury. Leaphart simply failed to inform himself of basic Georgia criminal procedure in sentencing proceedings. *Cf. Young v. Zant*, 677 F.2d 792 (11th Cir. 1982). No strategy based on such a false assumption is reasonable. The district court clearly erred in concluding otherwise.[12]

The district court also found that Leaphart's failure to substantially investigate mitigating evidence was based on a strategic choice to rely in closing argument on the "major argument" in Burger's behalf that he had no prior record of violent crime and had never been in trouble before. As it relates to Burger's second sentencing proceeding, this finding is contradicted by the record: at no point in his closing argument did Leaphart mention the lack of evidence that Burger had a record or had been in trouble before. Instead, Leaphart's closing argument at the second sentencing proceeding stressed Burger's comparative lack of culpability and asked for the jury's mercy. This argument would not have been undercut by the presentation of humanizing evidence concerning Burger's background.

In short, Leaphart's decision neither to conduct substantial investigation nor to present any evidence at the sentencing proceedings was not a reasonable strategic choice. It was, moreover, readily distinguishable from the choices made by attorneys in those cases relied upon by

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[12] The district court's explanation that Leaphart's rationale was appropriate in the context of the culpability trial provides no justification for its application in the context of a sentencing proceeding where, as noted above, the Georgia procedural rules are different.

the district court. In *Cape v. Francis*, 741 F.2d 1287 (11th Cir.), the district court found that petitioner's attorney presented some mitigating evidence during the sentencing proceeding; and in *Strickland v. Washington*, *supra*, petitioner's attorney relied on character testimony that had come in at an earlier plea colloquoy. 104 S.Ct. at 2071. Leaphart's presentation of no evidence in the instant case is different; it represented an error "so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." *Strickland v. Washington*, *supra*, 104 S.Ct. at 2064.

But the Sixth Amendment inquiry does not end with a finding of unreasonable performance by counsel. Burger may prevail only if he shows both a denial of effective assistance and actual prejudice to the course of his defense. *Id.* In this case, however, prejudice is apparent.

At the federal habeas hearing, Burger offered the testimony of his mother and numerous affidavits concerning his troubled childhood and background. This evidence demonstrated that Burger's parents had been married when his mother was fourteen and his father was sixteen. His parents divorced when he was a child. Neither parent wanted Burger and his childhood was spent being shuffled between the two. His father threw him out of the house; his mother sent him back to live with his father. Burger's mother remarried. Burger's stepfather beat Burger, and beat Burger's mother in his presence; Burger's stepfather involved him in drugs and alcohol when he was eleven years old. Burger's mother and stepfather moved from Indiana to Florida. Burger was sent to live with his father. Burger's father beat him and refused to have anything to do with him. Burger ran away and hitchhiked to Florida to live with his mother, selling his shoes to buy food along the way. When Burger arrived barefoot in Florida, his stepfather told him he could not stay with them. Burger's mother told juvenile authorities that she didn't want him, and to send him back to his father in Indiana. When Burger arrived in Indiana, his father locked him out of the house. Burger

was taken in by a neighbor, as he had nowhere else to go. The clinical psychologist who examined Burger testified at a motion hearing that Burger had an I.Q. of 82 and possible brain damage.

I cannot accept the holding that the failure to present this evidence was not prejudicial to Burger. The district court found that, although the affidavits of the character witnesses supplied by Burger at the hearing do "contain references to a difficult childhood which might have created some sympathy for Mr. Burger," they also contained references to drug abuse, juvenile probation and violence. However, the thrust of the character testimony offered by Burger was not that Burger was a model citizen, but that Burger's personality and motivation could be explained by his unusually stormy childhood. Although this is precisely the kind of humanizing evidence that "may make a critical difference, especially in a capital case," *Stanley v. Zant*, *supra*, 697 F.2d at 969, Leaphart elected neither to conduct further investigation nor to use the evidence at the sentencing proceeding. Having heard the state's case, unmitigated by any evidence presented on behalf of petitioner, two sentencing juries recommended the death penalty.

Failure to present this substantial, available mitigating evidence meets the prejudice prong of *Strickland v. Washington*, *supra*. In fact Leaphart's failure to investigate or to present evidence on his client's behalf is an apt example of the kind of "breakdown in the adversarial process," *id.* at 2069, that requires a reviewing court to find the results of a proceeding unreliable.

For these reasons, I would reverse the district court's finding that Burger was afforded the effective assistance of counsel during his state court proceedings and remand this case with directions to grant the writ.

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 81-7419

CHRISTOPHER A. BURGER, PETITIONER-APPELLEE,
CROSS-APPELLANT

v.

RALPH KEMP, Warden, Georgia Diagnostic and
Classification Center, RESPONDENT-APPELLANT,
CROSS-APPELLEE

March 13, 1986

Appeals from the United States District Court
for the Southern District of Georgia

Before VANCE and JOHNSON, Circuit Judges, and ALLGOOD *, Senior District Judge.

ON REMAND FROM THE SUPREME COURT
OF THE UNITED STATES

PER CURIAM:

This habeas corpus action, before us for the third time, was remanded by the Supreme Court for our re-

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* Honorable Clarence W. Allgood, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

consideration in light of *Francis v. Franklin*, —— U.S. ——, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985), *aff'g* 720 F.2d 1206 (11th Cir.1983). The facts of the underlying murder case, for which petitioner Burger was sentenced to death, are reported at *Blake v. Zant*, 513 F.Supp. 772, 788-89 (S.D.Ga.1981). The sole issue now before us is whether the trial court's jury instruction on intent impermissibly shifted the burden of proof on that issue to the defendant. We hold that the challenged instruction constituted harmless error. In our previous opinions, 718 F.2d 979 (11th Cir.1983), 753 F.2d 930 (11th Cir.1985), we found the other issues presented in Burger's habeas petition to be without merit. Consequently, we remand to the district court with instructions that the writ be denied.

In *Franklin*, the petitioner argued that the state trial court erred in giving the following jury instruction:

> A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts, but the presumption may be rebutted. A person will not be presumed to act with criminal intention but the trier of facts, that is, the Jury, may find criminal intention upon a consideration of the words, conduct, demeanor, motive and all other circumstances connected with the act for which the accused is prosecuted.

Franklin, —— U.S. ——, 105 S.Ct. at 1969-70; 720 F.2d at 1209 n. 2. The Supreme Court agreed with our conclusion that this instruction was constitutionally infirm under *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979), because a reasonable juror could understand it as creating a mandatory—though rebuttable—presumption of intent shifting the burden of proof on that issue to the defense. —— U.S. at ——, 105 S.Ct. at 1977; 720 F.2d at 1212. The Court also agreed with our finding that under the circumstances of the case, the *Sandstrom* error could not be considered harmless. *Id.*

The jury instruction challenged in this case is virtually identical to the one held unconstitutional in *Franklin*. After giving the *Franklin* instruction, however, the court in this case added the following:

> A specific intent to commit the crime charged in this indictment is an essential element that the State must prove beyond a reasonable doubt. Intent is always a question for the jury, and is ordinarily ascertained by acts and conduct. Intent may be shown in many ways, provided the jury finds that it existed from the evidence produced before you. It may be inferred from the proven circumstances, or by acts and conduct, or it may be presumed when it is the natural and necessary consequences of the act.

Blake, 513 F.Supp. at 792.

This additional language, taken by itself, appears to be constitutionally unobjectionable; rather than creating a mandatory presumption, it merely instructs the jury that it *may* presume intent from the natural consequences of an act. The Supreme Court made clear in *Franklin*, however, that "[l]anguage that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity." —— U.S. at ——, 105 S.Ct. at 1975. Thus, whether this additional language sufficed to render the instruction constitutional may depend upon whether the language is viewed as clarifying or merely contradicting the erroneous charge which preceded it.

We need not reach this issue, however, because we conclude that any error in the instruction was harmless. In *Franklin* the defendant had based his entire defense on the issue of intent, and "[t]he facts did not overwhelmingly preclude that defense." 720 F.2d at 1212. We thus concluded that "[b]ecause intent was plainly at issue in [the] case, and was not overwhelmingly proved by the evidence . . . we cannot find this error to be harmless." *Id.* The Supreme Court agreed. —— U.S. at

——, 105 S.Ct. at 1977. On the other hand, if intent is *not* at issue in a case, or if intent *is* overwhelmingly proved, a *Sandstrom* error on the element of intent may be found harmless. *Davis v. Kemp*, 752 F.2d 1515, 1521 (11th Cir.) (en banc), *cert. denied*, —— U.S. ——, 105 S.Ct. 2689, 86 L.Ed.2d 707 (1985).[1]

In this case, Burger's sole defense was to put the prosecution to its proof. As the essence of such a defense is to require the state to fulfill its burden as to each element of the offense, it cannot be said that intent was not at issue. *Cf. id.* (defense of non-participation removes intent from issue even without explicit concession). Nevertheless, it is significant that Burger chose not to raise the issue of intent expressly, for this left uncountered the strong implication of intent which was bound to arise from the evidence presented by the state.

The record tends to show that after sexually assaulting their victim, Burger and his co-defendant placed the victim in the trunk of his taxicab. After telling a friend what they had done, they drove to a water-filled pit. Opening the trunk, Burger found that the victim was still alive. With the victim still inside Burger then closed the trunk once more, removed incriminating fingerprints from the vehicle, and drove the car into the pond, jumping out as the car entered the water. The victim died of drowning. Eventually, Burger confessed to the crime, described the incident in great detail, and led authorities to the pit, pointing out where they could find the victim's body.

Burger's only argument as to why the *Sandstrom* error should not be considered harmless in light of the overwhelming evidence from which the jury could infer intent is that he had consumed "four or five pitchers of beer" before the incident. This, he argues, brings his

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[1] We note that the Supreme Court has recently granted certiorari in a case in which it may consider whether a *Sandstrom* error was harmless. *Rose v. Clark*, 762 F.2d 1006 (6th Cir.), *cert. granted*, —— U.S. ——, 106 S.Ct. 59, 88 L.Ed.2d 48 (1985).

case under our decision in *Thomas v. Kemp*, 766 F.2d 452 (11th Cir.1985), in which a *Sandstrom* error on intent was found not harmless where the defendant was intoxicated. In *Thomas*, however, the defendant affirmatively raised the issue of intent:

> Thomas took the stand in his own defense and testified that he had no memory of the incident . . . He attributed his lack of memory to pills he . . . ingested. . . . Thomas' counsel elicited testimony from the State's examining psychiatrist that it would be possible for a drug to "overmaster [a] person's will or impel him to commit a crime," . . . [and] requested and obtained a jury charge on drug intoxication. . . .

766 F.2d at 455-56. By contrast, Burger raised no intoxication defense. Burger's counsel mentioned the beers in his opening statement and Burger's confession referred to them, but the defense made no attempt to argue that the alcohol in any way diminished Burger's capacity or rendered him incapable of forming an intent to commit the murder.

Under *Sandstrom*, a jury may never be instructed that intent is or must be presumed. Nevertheless, a case may present circumstances which imply intent so overwhelmingly that a reviewing court may conclude that any reasonable jury would infer intent even without being instructed that it had to do so. This is such a case. We are convinced beyond a reasonable doubt that a reasonable jury would have convicted Burger without having to interpret the jury instructions as creating a mandatory presumption of intent. We therefore hold that any error in the instructions was harmless.

The case is REMANDED to the district court with instructions that the writ be denied.

JOHNSON, Circuit Judge, dissenting:

In *Franklin v. Francis*, —— U.S. ——, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985), the United States Supreme Court held that a jury instruction virtually identical to one given in this case was unconstitutional because a reasonable juror could have understood it to shift to the defendant the burden of proof on the issue of intent. The majority does not reach the issue of whether additional language rendered this instruction constitutionally permissible in the instant case, because the majority holds that, even if the instruction was unconstitutional, any error in the instruction was harmless. In coming to this conclusion, the majority misreads the record of petitioner's trial in state court. I dissent.

I. Constitutionality of the Challenged Instruction

It is clear that the challenged instruction in the instant case violated *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979), and its progeny, and therefore was unconstitutional. As in *Franklin*, the jury was instructed: "A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts, but the presumption may be rebutted." A reasonable juror could have understood this instruction to create "a mandatory presumption that shifted to the defendant the burden of persuasion on the element of intent once the State had proved the predicate acts." *Franklin, supra*, 105 S.Ct. at 1972.

The instruction in the instant case was followed by a further instruction, which stated:

> A specific intent to commit the crime charged in this indictment is an essential element that the State must prove beyond a reasonable doubt. Intent is always a question for the jury, and is ordinarily ascertained by acts and conduct. Intent may be shown in many ways, provided the jury finds that it existed

> from the evidence produced before you. It may be inferred from the proven circumstances, or by acts and conduct, or it may be presumed when it is the natural and necessary consequences of the act.

Blake v. Zant, 513 F.Supp. 772, 792 (S.D.Ga.1981). As the majority notes, the Supreme Court stated in *Franklin* that "[l]anguage that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity." *Franklin*, *supra*, at 1975. The Court continued, "A reviewing court has no way of knowing which of the two irreconcilable instructions the jurors applied in reaching their verdict." *Id.*

The instruction following the *Franklin* instruction in this case does not explain the *Franklin* instruction. In stating that the jury *may* presume intent from the natural consequences of an act, the second instruction merely contradicts the first. In this situation, we are required to hold that the *Franklin* instruction was unconstitutional.

II. Harmless Error Analysis

Where a burden-shifting instruction on intent constitutes *Sandstrom* error, the error can be held harmless if the court can say beyond a reasonable doubt that the fault instruction did not contribute to the verdict obtained. *Davis v. Kemp*, 752 F.2d 1515, 1521 n. 7 (11th Cir.1985) (en banc) (*quoting Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)). This Court has identified two situations where a *Sandstrom* violation on the issue of intent can be held harmless: (1) where intent is not at issue in the case, or (2) where the evidence of intent is overwhelming. *R. Tucker v. Kemp*, 762 F.2d 1496, 1502 (11th Cir.1985) (en banc).

The majority holds that in the instant case the petitioner's sole defense was to put the prosecution to its proof. The majority concludes that, although this defense put intent at issue, the defense "left uncountered

the strong implication of intent which was bound to arise from the evidence presented by the state." The majority therefore holds that the evidence of intent in this case was overwhelming, and that the *Sandstrom* error was harmless.

A reading of the state trial transcript reveals that Burger's defense entailed far more than simply putting the prosecution to its proof. Throughout the trial, Burger's counsel sought to show that Burger's co-defendant Stevens was the moving force behind the entire crime, and that Burger was merely a follower who did what Stevens told him to do. Indeed, the district court in this case has found that an examination of the trial record shows considerable effort to portray Stevens as the chief architect of the crime. *Blake*, *supra*, at 795. The essence of Burger's defense was that, although Burger took part in the crimes, he did so under duress and did not have the requisite intent for murder.

The state's main evidence in the guilt phase of this case came from a confession given by Burger and from testimony by James R. Botsford, who was in the same military unit as Burger and Stevens and was their squad leader. The confession was read to the jury by witness Clarence Haire, trial transcript ("tr.") at 278-286, who had taken the confession. In his confession, Burger stated that he and Stevens were out drinking on the night of the crime and ran out of money. Stevens suggested to Burger that they could get some money by robbing a cab driver. Stevens and Burger arranged to take a taxicab to the airport, where they were to pick up Botsford.

On the way to the airport, Stevens pulled a butcher knife on the cab driver, the victim of the crime. After the victim said that he had only sixteen dollars, Stevens forced the victim to get out of the cab and remove his clothes. Stevens discarded the clothes and got in the rear of the vehicle with the cab driver. While Burger was driving, Stevens forced the victim to perform oral sodomy

upon him, and Stevens then performed anal sodomy on the victim. At some point, Burger stopped the car and the victim was put in the trunk of the car.

Burger and Stevens picked up Botsford at the airport and proceeded to drive Botsford back to Fort Stewart, their military base. Botsford asked Burger why he was driving the taxicab, and Stevens answered that they had "taken" the taxicab. Stevens told Botsford that the cab driver was in the trunk, and indicated that they were going to kill the cab driver. As Botsford got out of the car at the base, he asked them not to kill the victim.

Burger and Stevens drove the vehicle away, and then encountered a patrol vehicle. When the patrol vehicle went by, Stevens told Burger that they were going to "get burnt," and that they had to do something with the cab. Stevens told Burger to drive to a nearby pond. At the pond, Stevens directed Burger to wipe the fingerprints off the car. Stevens then directed Burger to put the car in gear and run it into the pond.

After doing this, Burger started to walk away and told Stevens he was leaving. Stevens told him he could not leave, "because we have to make sure—want to make sure the car goes down, with the man in the trunk."

In his cross-examination of Mr. Haire, Burger's counsel asked, "Now, your testimony to this jury as to what Burger told you—based on your testimony, is it not, as to what he said and what is contained in his statement, that Stevens was the one that said drive it to the pond, and Stevens more or less directed the whole operation, according to your testimony; is that correct?" Tr. at 297. The court sustained an objection to the question, stating to Burger's counsel: "You're getting into the province of the jury to determine the facts of the situation." *Id.* Burger's counsel then elicited from Mr. Haire the fact that Burger was only 17 years old at the time of the crime.

Mr. Botsford was the key witness for the state. On cross-examination by Burger's counsel, Mr. Botsford gave the following testimony:

Q. Mr. Botsford, I think you were friends—you say you were friends with Chris Burger and Tom Stevens in boot camp?

A. That's correct.

Q. When they—when you got in the cab and you heard this voice or whatever it was in the back of the cab, did you know who that was?

A. No, I didn't.

Q. So you don't know of your own knowledge whether that was Roger Honneycutt or not; do you?

A. I didn't know him by name. I knew it was the cab driver.

Q. You just knew it was the cab driver back there?

A. The cab driver of the cab.

Q. Well, that's just because they told you it was; isn't that right?

A. That's right.

Q. And, the person that told you that was Stevens?

A. That's correct.

Q. In fact, Stevens was the one that was doing all the talking; wasn't he?

A. Most of it.

Q. And, Burger was just sorta going along, sorta doing sorta like Stevens was telling him to do; wasn't he?

A. Sorta.

> Q. I think you said that when you said something about turning the cab driver loose, Burger agreed that was the thing that should be done?
>
> A. That's correct.

Tr. at 111.

A clinical psychologist testified that Burger had an IQ of 82, and that Burger lacked the motivation or power of reasoning to learn from previous experiences. Tr. at 247. The psychologist also testified that Burger was "functioning probably at the level of about a twelve year old person." Tr. at 248.

Finally, in closing argument at the guilt phase, Burger's counsel sought to emphasize the evidence that had been produced indicating that Stevens was in control of the crime. Counsel said:

> One of the interesting things is the testimony here by Botsford was all about Stevens, what Stevens did. what Stevens said; not what Burger did or what Burger said. I would have thought and you may gather that we weren't trying Chris Burger here; we were trying Thomas Stevens. Don't convict Burger on what somebody said about Stevens, because Stevens is not on trial. Burger is on trial.

Tr. at 371-72.

It is clear from the foregoing that Burger's defense did not consist merely of putting the prosecution to its proof. Rather, Burger presented substantial evidence, and argument based on that evidence, that his participation in the crime was under the direction and control of Stevens. Stevens did virtually all the talking and gave all the orders. The crime and the killing were Stevens' ideas. Botsford testified that, when Botsford suggested that the cab driver should be set free, *Burger agreed that this was what should be done.*

Burger's defense went squarely to the issue of whether he intended to kill the victim. I cannot agree with the

majority that the evidence of Burger's intent to kill was overwhelming. In finding that Burger had the requisite intent, the jury might have relied on the faulty instruction that a person is presumed to intend the natural and probable consequences of his acts. I cannot say beyond a reasonable doubt that the faulty instruction did not contribute to the verdict obtained. *Davis, supra*, at 1521 n. 7. Accordingly, I dissent.

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 81-7419

CHRISTOPHER A. BURGER, PETITIONER-APPELLEE,
CROSS-APPELLANT

v.

RALPH KEMP, Warden, Georgia Diagnostic and
Classification Center, RESPONDENT-APPELLANT
CROSS-APPELLEE

July 23, 1986

Appeal from the United States District Court
for the Southern District of Georgia

Before VANCE and JOHNSON, Circuit Judges, and ALLGOOD *, Senior District Judge.

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion March 13, 1986, 11 Cir., 785 F.2d 890)

PER CURIAM:

The panel opinion of March 13, 1986 should not be interpreted as requiring a defendant to place intent ex-

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* Honorable Clarence W. Allgood, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

plicitly in issue before he can prevail on a challenge to burden shifting instructions on criminal intent. The panel majority simply noted that evidence of intent is more likely to be overwhelming where the defendant has not attempted to counter the state's evidence on criminal intent.

With the foregoing clarification of the panel opinion the petition for panel rehearing is DENIED and no member of this panel nor other judge in regular active service on the court having requested that the court be polled on rehearing en banc, Fed.R.App.P. 35, 11th Cir. Rule 26, the suggestion for rehearing en banc is DENIED.

Judge JOHNSON adheres to the views previously expressed in his dissent from the panel opinion.

SUPREME COURT OF THE UNITED STATES

No. 86-5375

CHRISTOPHER A. BURGER, PETITIONER

v.

RALPH KEMP, Warden

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis, be and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

November 3, 1986

(6)

Supreme Court, U.S.
FILED
DEC 18 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-5375

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CHRISTOPHER A. BURGER,

Petitioner,

v.

RALPH KEMP, WARDEN, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

I. (A) Whether, in this capital case, Petitioner was denied the right to the conflict free and effective assistance of counsel under circumstances where his court appointed trial counsel represented Petitioner as well as a co-indictee with inherently adverse interests?

(B) Whether, in this capital case, Petitioner was denied the right to the effective assistance of counsel due to trial counsel's failure to investigate and present available mitigating evidence that if presented to the sentencing jury would have resulted in a reasonable probability of a sentence of life imprisonment as opposed to the death penalty?

II. Whether, in this capital case, the trial court's jury instruction on malice and intent, an instruction in all material respects identical to the one found constitutionally deficient in *Francis* v. *Franklin*, was harmless beyond a reasonable doubt despite substantial record evidence that at the time of the offense Petitioner was intoxicated and was acting under the direction and domination of his co-indictee?

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CITATION TO OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported as *Burger* v. *Kemp*, 785 F.2d 890 (11th Cir. 1986) and is reproduced in the Joint Appendix [J.A.] at 194. The *per curiam* order denying rehearing is reported as *Burger* v. *Kemp*, 796 F.2d 1313 (11th Cir. 1986), and is reproduced at J.A. 206. The previous opinions of the United States Court of Appeals for the Eleventh Circuit in this case are reported as *Burger* v. *Zant*, 718 F.2d 979 (11th Cir. 1983), *vacated and remanded*, ___ U.S. ___, 104 S.Ct. 2052 (1984) (reproduced at J.A. 130) and *Burger* v. *Kemp*, 753 F.2d 930 (11th Cir.), *vacated and remanded*, ___ U.S. ___, 106 S.Ct. 41 (1985) (reproduced at J.A. 159).

JURISDICTION

The jurisdiction of this Court rests upon 28 U.S.C. § 1254 (1), Petitioner having asserted below and asserting here a deprivation of rights secured by the Constitution of the United States.

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on March 13, 1986. A timely petition for rehearing and suggestion for rehearing *en banc* was denied by that court on July 23, 1986. The Petition for a Writ of Certiorari was filed on August 30, 1986, and was granted on November 3, 1986.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth Amendment to the Constitution of the United States, which provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.

The Eighth Amendment to the Constitution of the United States, which provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the Constitution of the United States, which provides in pertinent part:

> [N]or shall any state deprive any person of life, liberty or property without due process of law . . .

It further Ga. Code Ann. § 27-2537; O.C.G.A. § 17-10-35, which provides, in pertinent part:

> (a) Whenever the death penalty is imposed, upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Supreme Court of Georgia. . . ."
>
> * * *
>
> (c) With regard to the sentence, the court shall determine:
>
> * * *
>
> (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

Ga. Code Ann. § 26-1101(a); O.C.G.A. § 16-5-1(a) which provides:

> A person commits the offense of murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being.

Ga. Code Ann. § 27-2503(a) & (c); O.C.G.A. § 17-10-2(a) & (c) which provide:

> (a) Except in cases in which the death penalty may be imposed, upon the return of a verdict of "guilty" by

the jury in any felony case, the judge shall dismiss the jury and shall conduct a presentence hearing at which the only issue shall be the determination of punishment to be imposed. In the hearing the judge shall hear additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or nolo contendere of the defendant, or the absence of any prior conviction and pleas, provided that only such evidence in aggravation as the state has made known to the defendant prior to his trial shall be admissible. The judge shall also hear argument by the defendant or his counsel and the district attorney, as provided by law, regarding the punishment to be imposed. The district attorney shall open and the defendant or his counsel shall conclude the argument. Upon the conclusion of the evidence and arguments, the judge shall impose the sentence or shall recess the trial for the purpose of taking the sentence to be imposed under advisement. The judge shall fix a sentence within the limits prescribed by law.

* * *

(c) In all cases tried by a jury in which the death penalty may be imposed, upon a return of a verdict of "guilty" by the jury, the court shall resume the trial and conduct a presentence hearing before the jury. The hearing shall be conducted in the same manner as presentence hearings conducted before the judge as provided for in subsection (a) of this code section. Upon the conclusion of the evidence and arguments; the judge shall give the jury appropriate instructions, and the jury shall retire to determine whether any mitigating or aggravating circumstances, as defined in Code Section 17-10-30, exist and whether to recommend mercy for the defendant. Upon the findings of the jury, the judge shall fix a sentence within the limits prescribed by law.

STATEMENT OF THE CASE

During the evening of September 5, 1977, seventeen (17) year old Christopher Burger and his co-indictee, Thomas Stevens, both privates in the Army stationed at Ft. Stewart, Georgia, were drinking heavily. The two consumed approximately four or five pitchers of beer at a local club. Tr. 71.[1] After they ran out of money, Stevens told Petitioner they could obtain more money by robbing a taxicab driver. Stevens then obtained a knife and knife sharpener to accomplish the robbery.

They called a taxi which, when it arrived, was driven by Roger Honeycutt. Honeycutt was threatened with the weapons and robbed by Stevens. At Stevens' direction, Christopher Burger drove the taxi, Stevens and Honeycutt were in the back seat. After Stevens forced Honeycutt to undress, Stevens sexually assaulted him. Afterwards, Stevens locked Roger Honeycutt in the trunk of the taxi.

Burger and Stevens then drove to the Savannah, Georgia airport to pick up James Botsford, an acquaintance of theirs. Botsford testified that during the drive, Stevens informed him in great detail of the circumstances of the robbery and that Honeycutt was still in the trunk of the car. Burger said very little and according to Botsford was essentially doing as Stevens directed. Tr. 112-13.

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[1] References to the transcript of Petitioner's first trial where the issue of guilt/innocence was decided are referenced in this brief as "Tr."; references to Petitioner's second trial where the sentence of death was again imposed are referenced "R. Tr."; references to the evidentiary hearing held in the federal habeas corpus proceedings in the United States District Court for the Southern District of Georgia are referenced as "FHT."

Stevens suggested that he would kill Honeycutt. Burger was opposed to doing so. Botsford then indicated that if they would release Honeycutt he (Botsford) would not tell anyone about the incident. Burger again stated that Honeycutt should be released. Botsford testified as follows:

> Q. [By the District Attorney] What did you say, if anything, about the man in the trunk?
>
> A. [By Botsford]: I asked them what they intended to do with him.
>
> Q. All right. What response, if any, did you get?
>
> A. Well, Tom Stevens said that he thought they should kill him. And, I told him I thought he was crazy. And, Burger didn't like the idea of killing him either. Burger said that they ought to let him go, that they ought to drive off in the woods somewhere and let him out, and then take the car somewhere and put it like, I think somebody mentioned the ocean. They said they wanted to go to maybe Jacksonville or Savannah, and maybe run the car off a pier. R. Tr. 112-113.

After Botsford was dropped off at Fort Stewart, Stevens directed Burger to drive the taxi to a pond in rural Wayne County, Georgia, a few miles from Fort Stewart. Stevens later ordered Petitioner to drive the taxi into the pond. He acquiesced. After doing so, Burger started to leave, Stevens told him he could not leave, "because we have to make sure—want to make sure the car goes down, with the man in the trunk." Stevens then disposed of the remaining physical evidence.

Petitioner was subsequently arrested and charged with murder. Alvin Leaphart was appointed to represent Burger at his first capital murder trial, at the second sentencing trial and twice on direct appeal to the Supreme Court

of Georgia. Mr. Leaphart's law partner in a two-partner law firm, Robert Smith, was appointed to represent Burger's co-indictee, Thomas Stevens. FHT 13; J.A. at 30-31.

However, in fact both attorneys represented both co-indictees.[2] Both Leaphart and Smith conducted attorney-client conferences with both Stevens and Burger. Leaphart assisted Smith in the preparation of Stevens' case and Smith did likewise. FHT 15, 18; J.A. at 32, 35. The two discussed the issues involved in each case and shared their work product. FHT 18; J.A. 35. The joint counsel approach used by Leaphart and Smith was not only done privately; Smith sat with Leaphart and served as co-counsel at trial. Both Burger's and Steven's cases were tried, on conflicting theories of defense, in the small, tightly knit community of Wayne County, Georgia. There was widespread public knowledge of the case and the court proceedings in the county. FHT 42-43; J.A. at 55-56.

Leaphart perceived the primary issues at trial to be Burger's intent and lesser culpability. The evidence regarding Petitioner's lesser culpability was substantial. At the time of the offense, Burger was seventeen; Stevens was twenty. Stevens was the leader in their relationship; Burger the follower. Stevens planned and initiated the robbery. He was the one who actually took the victim's money. Furthermore, Stevens alone sexually assaulted the victim. He tied the victim up and forced him into the trunk of the vehicle. Stevens told Burger they would have to kill Honeycutt, Burger resisted. Stevens ordered Burger to drive the cab into the pond. In short, the essence of

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[2] Burger was never informed of the conflict of interest caused by the dual representation. A defendant of course on his own can not be expected to understand the dangers and disadvantages of multiple representation. *See Camera* v. *Fogg*, 658 F.2d 80, 89 (2nd Cir. 1981).

Burger's defense was that he was less culpable than Stevens.

This conflict, caused by the joint representation, adversely affected Leaphart's performance. He refrained from taking actions on Burger's behalf that would have been detrimental to Stevens. Significant was that Leaphart never offered Burger's testimony against Stevens in exchange for a sentence less than the death penalty. FHT 38-39, 65; J.A. at 52, 74-75. At the federal habeas hearing, Leaphart testified that he had never discussed this possibility with the prosecution. FHT 38-39; J.A. at 52. When further questioned, Leaphart testified that he had engaged in plea negotiations, but that "during the first trial [the district attorney] refused to discuss it in any terms." FHT 65; J.A. at 74-75. Therefore, although plea negotiations were entered into in this case, Leaphart never offered his most valuable bargaining chip, Burger's testimony.

Additionally, Leaphart prepared the brief for both Burger and Stevens on each defendant's second appeal to the Supreme Court of Georgia. In Petitioner's brief, Leaphart did not argue that Burger was the less culpable party, although the Georgia death penalty statute requires the Georgia Supreme Court to perform comparative proportionality review.

No mitigating evidence was presented by Leaphart at the penalty phase of either of Petitioner's trials. Counsel persisted in this approach despite the fact that Burger was sentenced to die at the first trial. However, substantial mitigating evidence was readily available. The uncontradicted record evidence indicates that at the time of the offense, Petitioner was only seventeen years old. He had an I.Q. of 82 and functioned at the level of approximately a

twelve year old. Tr. 244, 247-48. There was evidence of brain damage in all likelihood caused by blows to Burger's head when he was a child. *Id.*[3] Petitioner had absolutely no prior criminal record. His total prior involvement with the law was that he had been previously adjudicated to be a runaway.

The available, yet unused, evidence regarding Petitioner's upbringing demonstrated that Burger's parents had been married when his mother was fourteen and his father was sixteen. FHT 81; J.A. at 88. His parents divorced when he was a small child. Neither parent wanted Christopher and his childhood was spent being sent from one home where he was unwanted to another. His father would throw him out of his house; his mother would then send him back to live with his father. FHT 84; J.A. at 91.

Petitioner's mother subsequently remarried. His new stepfather beat him and beat Burger's mother in his presence. His stepfather involved him in drugs and alcohol when he was only eleven years old. FHT 84-85; J.A. at 91-92.

The following incident provides a powerful example of the physical and emotional abuse which Petitioner suffered. Burger's mother and stepfather moved from Indiana to Florida. Petitioner was sent to live with his natural father, who beat him and refused to have anything to do with him. He ran away and hitchiked to Florida to live with his mother. He was forced to sell his shoes to buy food along the way. When Petitioner arrived barefoot, his stepfather would not allow him to stay. His mother con-

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[3] This evidence of Christopher Burger's low I.Q. and brain damage was never presented to the jury at either trial; it was presented only at a motion to suppress hearing at the first trial.

tacted juvenile authorities and informed them that she didn't want Burger and to send him back to his father in Indiana. When Burger arrived in Indiana, his father locked him out of the house. FHT 85-86; J.A. at 92-9.3 Burger was taken in by a neighhbor, as he had nowhere else to go.

Due to his mental limitations, as well as this turbulent family history, Petitioner had no sense of self worth and desparately sought acceptance, from whomever and wherever it was available. FHT 84-85; J.A. at 91-92. He was the perfect candidate to fall under the domination of a man like Stevens.

None of this evidence, however, was presented to either jury that sentenced him to die. Leaphart had no knowledge of most of this evidence, even though the record reveals that it was easily discoverable. For a further exposition of the facts, *see* the dissenting opinions of Circuit Judge Johnson, 718 F.2d at 987-994; 753 F.2d at 942-48; 785 F.2d at 892-95; J.A. at 145-158; 182-193; 199-205.

This is the third time that this case has been before this Court. On two previous occasions this Court vacated the decision of a divided panel of the Eleventh Circuit which denied habeas corpus relief. *Burger* v. *Zant*, 718 F.2d 979 (11th Cir. 1983),[4] vacated and remanded, ____ U.S. ____,

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[4] Petitioner was convicted and sentenced to death on January 25, 1978. On his initial direct appeal to the Supreme Court of Georgia, the conviction was affirmed, but the death sentence was vacated and the case remanded for retrial solely on the issue of penalty. *Burger* v. *State*, 242 Ga. 28, 247 S.E.2d 834 (1978). At the second sentencing trial, Petitioner was again sentenced to death; the sentence was affirmed by the Supreme Court of Georgia. *Burger* v. *State*, 245 Ga. 458, 265 S.E.2d 796 *cert. denied*, 448 U.S. 913 (1980). After State

104 S.Ct. 2052 (1984); *Burger* v. *Kemp*, 753 F.2d 930 (1985), *vacated and remanded*, ___ U.S. ___, 106 S.Ct. 41 (1985). On remand, the same panel of the Eleventh Circuit, still divided, again denied relief. *Burger* v. *Kemp*, 785 F.2d 890 (11th Cir.), *rehearing denied*, 796 F.2d 1313 (1986). This Court granted certiorari on November 3, 1986.

SUMMARY OF ARGUMENT

This capital case involves several questions easily resolved in Petitioner's favor by a straightforward examination of the uncontradicted record evidence in light of this Court's established legal principles.

Petitioner's trial counsel labored under a pervasive conflict of interest. Burger's counsel and his partner in a two partner law firm were appointed to represent both Petitioner and his co-indictee, Thomas Stevens. The two attorneys were actively involved in the representation of both Petitioner and Stevens. The confessions of the two defendants placed primary blame on the other. However, the overwhelming evidence was that Stevens was the far more culpable party. Despite the difference in culpability, counsel never offered Petitioner's testimony in exchange for a sentence of less than death and took other actions adverse to Burger's interests. This constituted an actual conflict of interest and requires that Petitioner receive a

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post-conviction remedies were exhausted, the United States District Court for the Southern District of Georgia granted habeas corpus relief—on an unrelated issue—only on the issue of sentence. Relief was denied on all other grounds. *Burger* v. *Zant*, 513 F.Supp. 772 (S.D.Ga. 1981). Both sides appealed. The divided panel of the Eleventh Circuit reversed the district court's grant of habeas corpus relief and affirmed the district court in all other respects, effectively reinstating Petitioner's sentence of death.

new trial where he is afforded his Sixth Amendment right to conflict free representation.

At the time of the crime for which he ultimately twice received the death penalty, Christopher Burger was seventeen years old and had no prior criminal record. Due to a very low I.Q. and likely brain damage he functioned at the approximate mental level of a twelve year old. He had a deprived and turbulent childhood where he was both physically and emotionally abused and shuttled back and forth between parents who wanted nothing to do with him. He was introduced to drugs at the age of eleven by a stepfather who also beat him. None of this evidence, however, was presented to either jury that sentenced him to die. Most of this evidence was easily discoverable although unknown to trial counsel. He did absolutely no investigation for the penalty phase of Petitioner's bifurcated trial, preferring instead for reasons either unreasonable or incorrect as a matter of fact and law to rely solely on arguing to the jury Petitioner's lesser culpability in the murder. He pesisted in this approach after Petitioner's first death sentence was reversed by the Georgia Supreme Court. Again after counsel presented no evidence at the penalty phase of Petitioner's second trial, Burger was sentenced to die. This conduct was not only far outside the wide range of competent assistance in a capital sentencing proceeding, but if not for counsel's unprofessional conduct there is a substantial likelihood that the result of the proceeding would have been different, i.e., Petitioner would have received a sentence of life imprisonment rather than the death penalty.

The malice charge given at the guilt/innocence phase of Petitioner's trial was in all material respects indistinguishable from the charge found constitutionally deficient in *Francis* v. *Franklin*. Furthermore, under the

circumstances of this case the error was not harmless beyond a reasonable doubt. The evidence at Petitioner's trial indicated not only that he was extremely intoxicated at the time of the offense but that he was acting under the domination of Stevens. Because the jury could have relied upon the presumption contained in the court's charge to find malice, the error could not have been harmless error pursuant to this Court's holding in *Rose* v. *Clark*.

ARGUMENT

I. IN THIS CAPITAL CASE, PETITIONER WAS DENIED THE RIGHT TO CONFLICT FREE AND EFFECTIVE ASSISTANCE OF COUNSEL.

A. Petitioner's Counsel Had An Actual Conflict Of Interest Because He Actively Participated In The Defense Of A Co-Indictee.

1. The nature of the actual conflict

Alvin Leaphart was appointed by the court to represent Petitioner at his capital murder trial.[5] His appointment continued throughout Burger's second sentencing trial and two direct appeals to the Supreme Court of Georgia. Mr. Leaphart's law partner in a two-partner law firm, Robert Smith, was court appointed to represent Burger's co-indictee, Thomas Stevens. FHT 13; J.A. at 31. Despite the fact that Leaphart and Smith were appointed, each attorney received a substantial fee, approximately nine thousand dollars ($9,000.00) each for a total of eighteen thousand dollars ($18,000.00). Leaphart admitted

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[5] Leaphart never graduated from college. He went to Ogelthorpe University for a year and Florida State University for a year. He received his law degree from an unaccredited law school, Atlanta Law School. FHT 54; J.A. at 65.

that this was the largest fee he had ever received in a criminal case. FHT 29; J.A. at 44.[6]

Both attorneys worked together to represent the two defendants. Leaphart conducted attorney-client conferences with both Stevens and Burger. He assisted Smith in the preparation of Stevens' case and Smith likewise assisted Leaphart in the preparation of Petitioner's case. FHT 15, 18; J.A. at 32, 35. The two partners discussed the issues involved in each case and shared work product. FHT 18; J.A. at 35. Smith sat with and assisted Leaphart at Petitioner's trial. Leaphart prepared the briefs for both Stevens and Burger on the second appeal to the Supreme Court of Georgia. FHT 40-41; J.A. at 54.

The primary issues at trial, as perceived by Leaphart were whether Burger had the requisite intent and whether he was less culpable vis-a-vis his co-indictee, Stevens. There was considerable evidence presented regarding Burger's lack of intent, i.e., evidence of intoxication, duress and unwillingness to kill the victim. The evidence of lesser culpability was overwhelming. At the time of the crime, Burger was seventeen; Stevens was twenty. Stevens was the leader; Burger the follower. Stevens planned and initiated the robbery of the victim; Burger simply followed his instructions. Stevens actually took the money from the victim; Stevens forced Honeycutt to have oral sodomy and anal sodomy with him;

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[6] The next largest fee he could even remember receiving in a criminal case was twenty-five hundred dollars ($2,500). *Id.* Each of Petitioner's trials took two days, including jury selection, presentation of evidence, argument, jury charge, deliberation and verdict. The fee received by each attorney for representing each client was deposited in the law firms corporate account. FHT 14-15; J.A. 31-32. This Court has recognized that an attorney's financial interest can create a conflict of interest. *See Wood* v. *Georgia*, 450 U.S. 261 (1981).

Stevens tied the victim up and forced him into the trunk of the car. When Stevens told Burger they would have to kill Honeycutt, Burger was strongly opposed to doing so. Stevens then told Burger they would have to get rid of the cab by driving it into the pond and ordered Burger to do so. Stevens was dominant; Burger was submissive.

Leaphart never informed Petitioner of the possibility of a conflict of interest nor did the trial court which appointed Leaphart and Smith, ever inquire into the possibility of a conflict of interest nor did it seek to limit the sharing of representation. FHT 15-16; J.A. at 32. Leaphart testified that he never perceived a conflict despite the fact that his primary defense was Petitioner's lesser culpability, i.e., the defense was to place the lion's share of the blame on Stevens, while Stevens' confession placed responsibility for the murder on Burger. In fact, the two confessions, given before either attorney was appointed, were contradictory on points essential to proof of the elements of the charged offenses. *Compare Burger* v. *State*, 242 Ga. 28, 247 S.E.2d 834 (1978) and *Stevens* v. *State*, 242 Ga. 34, 247 S.E.2d 838 (1978). Stevens' case was tried on the diametrically opposite theory, i.e., that Burger killed Honeycutt over Steven's protests. Leaphart testified at the evidentiary hearing that in the small community where Petitioner's case was tried it was impossible to keep a "secret" regarding the case. FHT 42; J.A. at 55. It was especially difficult to do so in this case where the facts of the crime were widely known. FHT 41; J.A. at 55. Therefore, it necessarily follows that the public, and very possibly members of the jury, knew that the cases were being tried on inherently inconsistent theories. This concern would have been especially relevant at Petitioner's sentencing retrial. Leaphart testified that the newspapers covered the trials extensively (FHT 42; J.A. at 55) and that people were aware, including potential

jurors, of the sentence imposed as well as the evidence presented at the first trials. FHT 42-43; J.A. at 56.[7]

2. The conflict adversely affected counsel's performance.

Under these circumstances, where the two defenses were inherently conflicting, any evidence or arguments made by Leaphart on Burger's behalf would necessarily be damaging to Stevens. The close cooperation of the two partners in this case rendered unfettered advocacy impossible. This conflict adversely impaired Leaphart's performance in a variety of ways. On several occasions, he refrained from taking actions on Burger's behalf that would have been detrimental to Stevens. Most significantly, neither before nor during either trial did Leaphart offer Burger's testimony in exchange for a sentence of life imprisonment.[8] FHT 38-39; J.A. at 52.

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[7] The jurors' awareness of the evidence and result of the first trial is clear from the voir dire at the second trial. The potential jurors were brought into the courtroom in panels of twelve. When each panel was brought in, Leaphart asked if any juror had any knowledge of the facts or details regarding the crime. Among the first panel of twelve, there were affirmative responses but the record does not reveal how many jurors had any knowledge of the previous events. R. Tr. 22. In the second panel of twelve, nine jurors had at least some knowledge. R. Tr. 34. Among the third panel of twelve, six jurors responded affirmatively. R. Tr. 40. And among the fourth panel, eight of twelve did so. R. Tr. 48.

[8] *See Baty* v. *Balkcom*, 661 F.2d 391, 397 n.12 (5th Cir. 1981) ("[p]lea bargains are perhaps the most obvious example of the manifest effects of a conflict of interest at pretrial proceedings."); *see also*, ABA Standards Relating to the Administration of Criminal Justice, The Defense Function § 4-3.5, commentary, p. 4-42 (conflict likely to occur in plea bargaining); *Developments in the Law: Conflicts of Interest in the Legal Profession*, 94 Harv. L. Rev. 1244, 1382 (1981) (recognizing the dangers of plea bargaining in multiple defendant

At the federal habeas hearing, Leaphart testified that he had not, at any time during his represenation of Burger, explored the possibility of Petitioner testifying against Stevens. FHT 38-39; J.A. at 52. When further questioned, Leaphart testified that he had engaged in plea negotiations, but that "during the first trial [the district attorney] refused to discuss it in any terms." FHT 65; J.A. at 74-75. However, he never offered the strongest weapon in his bargaining arsenal, Burger's testimony. Therefore, although some type of a plea negotiation was attempted, counsel never offered Burger's testimony against Stevens.[9]

Additionally, Leaphart prepared the briefs for both Burger and Stevens on each defendant's second appeal to the Supreme Court of Georgia. FHT 40-41; J.A. at 54. Although Leaphart had identified Burger's lesser culpability as the primary defense at trial, he did not argue in Burger's brief that he was substantially less

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cases); Geer, *Representation of Multiple Criminal Defendants: Conflicts of Interest and the Professional Responsibilities of the Defense Attorney*, 62 Minn. L. Rev. 119 (1978) (plea bargaining in mulitiple defendant cases is fraught with danger). *See also*, *Fleming* v. *State*, 246 Ga. 90, 270 S.E.2d 185, 189 (1980) (Bowles, J., concurring): "[n]o two defendants share equal responsibility for a crime. Usually one is more culpable than the other or for any number of reasons has a greater degree of responsibility for what occurred. One may also be more entitled to leniency based on such factors as age, intelligence, motive, background, previous conduct or record, etc. Common counsel eliminates any practical possibiity of plea bargaining."

[9] Prosecutors take plea bargains in the overwhelming number of potential capital cases for reasons frequently unrelated to the strength of the evidence. *See* White, *The Death Penalty in the Eighties: An Examination of the Modern System of Capital Punishment*, Chapter 2, Plea Bargaining and the Death Penalty (forthcoming Spring 1987).

culpable than Stevens. This omission is especialy significant because the scope of the Supreme Court of Georgia's appellate review in capital cases includes a consideration of whether the "sentence of death is excessive or disproportionate to the penalty in similar cases, considering both the crime and the defendant." Ga. Code Ann. § 27-2537(c)(3); O.C.G.A. § 17-10-35(c)(3).[10] There can be no conceivable strategic reason for omitting such a crucial issue from the brief, except for one; to have done so would have cast Stevens in an extremely unfavorable light. Leaphart's divided loyalties are manifest in the brief he filed on Burger's behalf.

A situation more conducive to divided loyalties than the situation in this case can hardly be imagined. Faced with the inherent conflict between Burger's and Stevens' defenses, it was impossible for Leaphart to fully and vigorously represent Petitioner at the same time that he was actively involved in representing Stevens.[11] Leaphart perceived a defense based upon Burger's lesser culpability vis-a-vis Stevens. However, it is obvious that

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[10] In *Gregg* v. *Georgia*, 428 U.S. 153 (1976), this Court placed a great deal of emphasis on the Georgia Supreme Court's review of death sentences in upholding the constitutionality of that particular system. 428 U.S. at 198, 204-06. This Court noted: "[i]n particular, the proportionality review substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury." *Id.* at 206. The Georgia Supreme Court on occasion has exercised its proportionality review and found the death penalty to be disproportionate. *See Hall* v. *State*, 241 Ga. 252, 244 S.E.2d 833 (1978) (less culpable co-indictee's sentence of death held to be disproportionate under the circumstances).

[11] It goes without saying that the presence of Stevens' lead counsel, Mr. Smith, at the defense table during trial would act as a tangible inhibiting influence against zealously advocating Burger's primary defense of lesser culpability.

any action taken by Leaphart on behalf of Christopher Burger would have worked to the extreme disadvantage of Stevens.

3. The conflict in light of this Court's prior decisions.

The most basic duty of counsel is the duty of loyalty. *Strickland* v. *Washington*, 446 U.S. 668, 692 (1984); *see also*, ABA Model Rules of Professional Conduct, comment to Rule 1.7 (1983) ("loyalty is an essential element in the lawyer's relationship to a client"). The jurisprudence of this Court has consistently recognized that where the constitutional right to counsel exists, there is a correlative right to representation that is free from a conflict of interest. *See, e.g., Wood* v. *Georgia*, 450 U.S. 261, 271 (1981). In *Holloway* v. *Arkansas*, 435 U.S. 475, 489-90 (1978), this Court recognized that the Sixth Amendment contemplates that the assistance of counsel will be untrammeled and unimpaired. Therefore, attorneys should not simultaneously represent conflicting interests. *Id.* at 482.[12] Joint representation of conflicting interests is suspect because of what it tends to prevent the attorney from doing. Although joint representation of multiple defendants is not *per se* violative of the Sixth Amendment, *Holloway*, 435 U.S. at 482, "a possible conflict of interest inheres in almost every instance of multiple rep-

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[12] Most jurisdictions appoint separate counsel for all indigent codefendants. *See* Lowenthal, *Joint Representation in Criminal Cases: A Critical Appraisal*, 64 Va. L. Rev. 939 (1978); *see also*, *Fleming* v. *State*, 264 Ga. 90, 270 S.E.2d 185 (1980) (for a more detailed discussion of *Fleming* see *infra*, n.21.) *Gendron* v. *State Bar of California*, 35 Cal.3d 409, 673 P.2d 260 (1983) (jointly charged codefendants entitled to separate and independent counsel); ABA Standards Relating to the Administration of Criminal Justice, The Defense Function, § 4-3.5(b), commentary p. 4-41 (normally joint representation should not occur in a criminal case).

resentation." *Cuyler* v. *Sullivan*, 446 U.S. 335, 348 (1980).

In this case there was no objection by either Petitioner or Leaphart to the joint representation. Generally under such circumstances, this Court has held that a person challenging his conviction must demonstrate that an actual conflict of interest existed.[13] *Cuyler* v. *Sullivan*, *supra*.

In order to establish the existence of an actual conflict, Petitioner must demonstrate that counsel actively represented conflicting interests. *Id.* at 349. However, if an actual conflict of interest exists, one need not demonstrate prejudice in order to be entitled to relief. *Id.* As this Court recognized in *Holloway*, *supra*, it is difficult if not impossible to assess the impact of an actual conflict of interest. 435 U.S. at 491. *See also*, *Strickland* v. *Washington*, *supra*, 466 U.S. at 692 (reaffirming that where an actual conflict is shown prejudice is presumed).

Conflict free representation, essential in any case, is of paramount importance in a capital case.[14] This Court has

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[13] However, Petitioner's case is a prime example of the exception noted in *Cuyler*, 446 U.S. at 347. The trial court must initiate an inquiry if "the trial court knows or reasonably should know that a particular conflict exists . . ." *Id.* In this case the trial judge sat at both Burger's and Stevens' first and second trials and heard the motions to suppress the confessions; he knew that the co-indictees had made irreconcilably conflicting confessions. By the end of the suppression hearings and certainly by the end of the first trials, the trial judge reasonably should have known of this serious conflict of interest.

[14] *See People* v. *Chacon*, 69 Cal.2d 765, 775, 447 P.2d 106, 73 Cal. Rptr. 10 (1968). In *Chacon*, Justice Traynor concluded that due to the uniqueness of the sentencing process in a capital case a lawyer cannot represent more than one defendant in a capital trial.

consistently emphasized the importance of consideration of the individual and his characteristics in the sentencing phase of a capital case. *See, e.g., Eddings* v. *Oklahoma*, 455 U.S. 104, 112 (1982) (the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender as a constitutionally indispensable part of the capital sentencing process.)

Even though Leaphart was not appointed to represent Stevens he was actively involved in his representation. He consulted confidentially with Stevens, aided in preparing his case for trial and prepared the briefs for both of his direct appeals. FHT 13-18; J.A. at 30-35. However, even had Leaphart not been directly involved in the representation of Stevens, which the uncontradicted record evidence indicates that he was, a conflict of interest would have still existed. Representation of co-indictees by two members of the same firm is sufficient to establish a conflict. *See, e.g., United States* v. *Flannagan*, 679 F.2d 1072 (3d Cir. 1982); *Ross* v. *Heyne*, 638 F.2d 979, 983 (7th Cir. 1980); *Zuck* v. *Alabama*, 588 F.2d 436, 438 (5th Cir. 1979); *United States* v. *Donahue*, 560 F.2d 1039, 1042 (1st Cir. 1977); Rule 44(c) of the Federal Rules of Criminal Procedure.[15]

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[15] *Cf.* ABA CODE OF PROFESSIONAL RESPONSIBILITY DR5-105 (D); ABA Standards Relating to the Administration of Criminal Justice, The Defense Function § 3.5(b):

> Except for preliminary matters such as initial hearings or applications for bail, a lawyer or *lawyers who are associated in practice*, should not undertake to defend more than one defendant in the same criminal case if the duty to one of the defendants may conflict with the duty to another. The potential for conflict of interest in representing multiple defendants is so grave that ordinarly a lawyer should decline to act for more than one of several co-defendants except in unusual situations when, after careful investigation, it is clear that no conflict is likely to develop and *when the several defendants give an informed consent to such multiple representation*. (emphasis added).

The fault in this case is primarily Leaphart's. He failed to call either to the trial court's or Burger's attention the pervasive conflict of interest.[16] Every published standard of professional ethics condemns the conduct of defense counsel in this case.[17] Ethical Canon 5-15 and Disciplinary Rule 5-105 of the ABA Model Code of Professional Responsibility, the prevailing set of professional norms at the time of Petitioner's trials, are unequivocal that a lawyer should never be involved in the representation of multiple clients with differing interests.[18]

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[16] *See Holloway* v. *Arkansas*, 435 U.S. at 485-6: ". . . defense attorneys have the obligation, upon discovering a conflict of interest, to advise the court at once of the problem."; *United States* v. *Mandell*, 525 F.2d 671 (7th Cir. 1975) [("We think the Sixth Amendment rights of defendants are adequately safeguarded *by imposing the duty of informing defendants of the potential dangers of multiple-client representation initially on the attorneys*, as officers of the court . . ." *Id.* at 677 (emphasis added)].

[17] The Sixth Amendment and the various canons of professional ethics are interactive. To some extent, Sixth Amendment principles rely on "the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the Amendment envisions." *Strickland*, 466 U.S. at 688.

[18] ABA Code of Professional Responsibility, Ethical Canon 5-15 states in pertinent part:

> If a lawyer is requested to undertake or to continue representation of multiple clients having potentially differing interests, he must weigh carefully the possibility that his judgment may be impaired or his loyalty divided if he accepts or continues the employment. He should resolve all doubt against the propriety of the representation. A lawyer should never represent in litigation multiple clients with differing interests: and there are few situations in which he would be justified in representing in litigation multiple clients with potentially differing interests. . . .

See also, ABA Code of Professional Responsibility, Disciplinary Rule 5-105, which states in pertinent part:

> (A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client

However, the trial court is also to blame. The same judge appointed one law firm to represent both Burger and Stevens and failed to inform Petitioner of the inherent conflict. Pursuant to this Court's decisions, if the trial court knows or under the circumstances should know that a particular conflict exists, then the court has an affirmative duty to take action. *Cuyler*, 446 U.S. at 347.[19] A trial court has the responsibility to avoid compromising counsel's ability to represent a client zealously within the bounds of the law by appointing one lawyer to defend two or more parties with inconsistent interests. *Foxworth* v. *Wainwright*, 516 F.2d 1072, 1076 (5th Cir. 1975).[20]

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will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing differing interests, except to the extent permitted under Dr 5-105(C).

(B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C).

[19] *See Foxworth* v. *Wainwright*, 516 F.2d 1072, 1076 (5th Cir. 1975) (trial judge has an obligation to anticipate conflicts reasonably foreseeable at the outset of the case when counsel is appointed); *see also*, *People* v. *Sanders*, 221 N.W.2d 243 (Mich. 1974) (existence of an exculpatory statement blaming a co-defendant is one of the most important criteria in determining whether a conflict exists).

[20] The above language from *Foxworth* v. *Wainwright* was noted with approval by this Court in *Cuyler* v. *Sullivan*, 446 U.S. at 347, n.13 (1980) as an exception to the general rule that the trial court is not required to automatically inquire into the circumstances of multiple representation. Fed. R. Crim. P. 44(c) requires the trial court to advise each defendant of his right to separate representation and to take affirmative steps to protect the right to counsel. A majority of states require the trial court to make an affirmative inquiry comparable to F.R. Crim. P. 44(c). Note, *Conflicts of Interest in the Representation of Multiple Criminal Defendants: Clarifying Cuyler* v. *Sullivan*, 70 Georgetown L.J. 1527, 1528 n.7 (1982).

Faced with the previously detailed disparity in the culpabilities of the parties, Leaphart should have offered Christopher Burger's testimony against Stevens to the prosecution in exchange for a life sentence.[21] Unfortunately, Leaphart never even raised this possibility during his representation of Petitioner. FHT 38-39; J.A. at 52. Additionally, there is the problem of how he could have arranged such a plea when his divided loyalties required him to protect Stevens' interests as well.

Although pervasive prejudice to Burger is obvious from the above facts, such a showing is not necessary. A defendant who shows that a "conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief." *Cuyler* v. *Sullivan*, 446 U.S. at 349-50.

As this Court noted in *Holloway* v. *Arkansas*, 435 U.S. at 490:

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[21] The Supreme Court of Georgia, subsequent to Petitioner's trials, adopted a mandatory rule in death penalty cases that co-defendants must be provided with separate and independent counsel. This rule applies with equal force to representation by a single attorney or by members of the same law firm. *Fleming* v. *State*, 264 Ga. 90, 270 S.E.2d 185, 188 and n.7 (1980). "Such a rule is especially necessary where the death penalty is sought, because in these cases even a slight conflict, irrelevant to guilt or innocence, may be important in the sentencing phase." *Id.* at 188. The logic of this rule, explained by Justice Bowles of the Georgia Supreme Court in his concurring opinion, is particularly relevant in Christopher Burger's case:

> No two defendants share equal responsibility for a crime . . . One may [be] entitled to leniency based on such factors as *age, intelligence, motive, background, previous conduct or record, etc.* Common counsel eliminates any practical possibility of plea bargaining.
>
> *Id.* at 189 (Bowles, J., concurring) (emphasis added).

> ". . . in a case of joint representation of conflicting interests the evil—it bears repeating—is in what the advocate finds himself compelled to *refrain* from doing, not only at trial but also as to possible pretrial negotiations and in the sentencing process . . . Thus, an inquiry into a claim of harmless error here would require, unlike most cases, unguided speculation. (emphasis in original).

Under the unique circumstances of this case, Petitioner is entitled to a new trial where he will be afforded effective and conflict free assistance of counsel.

B. Counsel's Failure To Make Any Investigation Or To Present Any Mitigating Evidence, Despite The Fact That Substantial And Compelling Evidence Was Available Undermines Confidence In Petitioner's Sentence Of Death.

Leaphart presented absolutely no mitigating evidence at the penalty phase of his bifurcated trial. He did this not once, but twice. Petitioner's first sentence of death was vacated by the Georgia Supreme Court. *Burger* v. *State*, 242 Ga. 28, 274 S.E.2d 834 (1978). Despite the fact that counsel's "strategy" had been given the ultimate test and found wanting he again failed to either investigate or present evidence of mitigating circumstances at the second sentencing trial. Petitioner was again sentenced to death. Leaphart testified at the federal evidentiary hearing that despite the outcome of the first two trials, he would still not present any mitigating evidence if he tried the case a third time; he would simply hope for a different jury. FHT 52; J.A. at 64. This failure to present evidence of mitigating circumstances was not based upon any even marginally reasonable strategy decision, but rather upon a failure to conduct a reasonably adequate investigation.

Our system of criminal justice presumes that counsel will act as an accused's advocate. *Anders* v. *California*,

386 U.S. 738 (1967). This Court has repeatedly emphasized the "fundamental" role of counsel to a fair trial. *See, e.g., United States* v. *Cronic*, 466 U.S. 648 (1984); *Argersinger* v. *Hamlin*, 407 U.S. 25, 31 (1972), *Gideon* v. *Wainwright*, 372 U.S. 335, 343-44 (1963). The theme of this Court's decisions is that counsel is the means through which the other rights of the accused are secured. *Cronic*, 466 U.S. at 653; *see also, United States* v. *Ash*, 413 U.S. 300, 307 (1973) (counsel serves as a "guide through complex legal technicalities"). Counsel's mere presence, however, is not sufficient to satisfy the constitutional command. *Strickland*, 466 U.S. at 685. Counsel's duty is "to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Id.* at 688.

Counsel's role in a capital sentencing proceeding is comparable to counsel's role at trial, i.e., to ensure that the adversarial process works to produce a just result. *Strickland* v. *Washington, supra*. Because the "penalty of death is qualitatively different . . . [t]here is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson* v. *North Carolina*, 428 U.S. 280, 305 (1976). Therefore, it is the obligation of trial counsel to protect and ensure the reliability of capital sentencing by assuring that a sentence of death is not imposed arbitrarily and/or in spite of factors which call for a less severe sentence.

A Sixth Amendment claim of ineffective assistance of counsel must be resolved by examining the facts of the case in light of the principles enunciated by this Court in *Strickland* v. *Washington, supra*. In *Strickland*, this Court determined that counsel was constitutionally ineffective if counsel's conduct so undermined the proper functioning of the adversary process that the trial cannot

be relied upon as having produced a just result. 466 U.S. at 687. *See Kimmelman* v. *Morrison*, ___ U.S. ___, 106 S.Ct. 2574, 2583 (1986) (essence of an ineffective assistance of counsel claim is that counsel's unprofessional errors render verdict suspect). That test is twofold: was counsel's performance in fact deficient; and, if so, was this prejudicial to the defense.

In order to make the first determination, this Court said that the proper inquiry is whether counsel's performance fell below an objective standard of reasonableness. *Strickland* v. *Washington*, 466 U.S. at 688. In other words, someone challenging the assistance of counsel must show that the particular acts of counsel were outside the "wide range of competent assistance." *Id.*[22]

In order to make the second determination, it must be shown that the acts of counsel that were outside the range of competence were actually prejudicial, i.e., that they had an adverse effect. 466 U.S. at 692. In order to demonstrate actual prejudice, the inquiry is whether there is a "reasonable probability that but for counsel's unprofessional errors the result of the proceeding would have been different." *Id.* at 694.

Of course, one of an attorney's principal duties is "to make a reasonable investigation or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 690-91; *see also*, *Darden* v. *Wainwright*, ___ U.S. ___, 106 S.Ct. 2464 (1986) (counsel not ineffective where he engaged in extensive pre-trial preparation and investigation for the penalty phase of

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[22] The Court also expressed a presumption in favor of competence that one challenging the effectiveness of counsel must overcome. 466 U.S. at 689.

Darden's trial); *Kimmelman*, *supra*, (failure to investigate suppression claim rendered counsel ineffective).[23] In a capital case, investigation of, preparation for and presentation of the mitigation case at the penalty phase is in many cases a much more critical task than is preparing for the guilt/innocence phase. Guilt is frequently a foregone conclusion. Whether the accused lives or dies, however, is not.

This Court's decisions have stressed that the sentencing body's possession of the fullest information possible concerning the defendant's life and characteristics is highly relevant if not essential to the selection of the appropriate sentence. *Lockett* v. *Ohio*, 438 U.S. 586 (1978), *see also*, *Jurek* v. *Texas*, 428 U.S. 262, 276 (1976) (sentencer must have before it all possible relevant information about the individual defendant whose fate it must determine). The reasoning behind this bedrock Eighth Amendment principle is self-evident. In capital cases, the penalty will frequently turn on counsel's ability to marshall and present mitigating evidence. An individualized decision is essential in capital cases in order that each defendant will be treated "with that degree of respect due the uniqueness of the individual." *Lockett*, 438 U.S. at 605. In a capital sentencing proceeding before a jury, "the jury is called upon to make a highly subjective, unique, individualized judgment regarding the punishment that a particular person deserves." *Turner* v. *Murray*, ___ U.S. ___, 106 S.Ct. 1683, 1687 (1986) [quoting *Caldwell* v.

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[23] *See also*, ABA Standards for Criminal Justice, Standard 4-4.1 (2d. ed. 1980) ("It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction.")

Mississippi, ___ U.S. ___, 105 S.Ct. 2633, 2645-6, n.7 (1985)].

It is essential, therefore, that the sentencer consider those "compassionate or mitigating factors stemming from the diverse frailties of humankind." *Woodson* v. *North Caroina*, 428 U.S. at 304. The sentencing body's failure to consider mitigating evidence creates the risk that the death penalty will be imposed in spite of factors which may call for less severe penalty. *Id.; see also, Skipper* v. *North Carolina*, ___ U.S. ___, 106 S.Ct. 1669 (1986) (State's exclusion of evidence regarding adjustment to prison violated Eighth Amendment); *Eddings* v. *Oklahoma*, 455 U.S. 104 (1982) (sentencers' failure to consider evidence of teenage defendant's turbulent family history violated Eighth Amendment); *Lockett* v. *Ohio*, *supra*.

If the sentencing authority's inability to consider substantial and persuasive mitigating evidence is due to counsel's failure to present it, though easily acquired, then "counsel's conduct [has] so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686.

1. The available mitigating evidence.

The available mitigating evidence has been set forth in detail in the Staement of the Case, *supra*. That evidence can be briefly summarized as follows. At the time of the offense Burger, an adolescent with a low I.Q. and likely brain damage functioned at the approximate mental level of a twelve year old. He had no prior criminal record. He was the son of teenage parents who subsequently divorced. His childhood was a horrifyng litany of physical beatings and psychological abuse. He was constantly

shuttled back and forth between parents who wanted nothing to do with him. Petitioner was introduced by a stepfather to drugs and alcohol at the age of eleven. Not one brushstroke of this tragic portrait of the Petitioner and the circumstances of his childhood was presented to either jury that sentenced him. Not even a single mother's tear was introduced to suggest to the jury that his life should be spared.

2. The nature of counsel's investigation and his "reasons" for not presenting evidence.

Leaphart testified at the evidentiary hearing that he elected not to present evidence concerning Petitioner's background because he knew of no witness that would have benefitted Burger at the sentencing trial. FHT 44; J.A. at 57.[24] He came to this conclusion after talking with Petitioner and very briefly with his mother. Leaphart knew that Burger was a mentally impaired adolescent. Tr. 244, 247-48. Petitioner, therefore, could hardly be expected to be conversant with the intricacies of the broad range of admissible evidence at the penalty phase of a bifurcated trial. Furthermore, even giving Leaphart's testimony at the evidentiary hearing a generous interpretation, he spent less than six hours talking with Burger. FHT 37; J.A. at 51. This time period is hardly adequate to investigate and explore Burger's life history as well as to determine the identity of other persons who might provide additional information. No reasonable determination to cease investigation could be made solely on the basis of his inadequate conversations with Petitioner.

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[24] Leaphart assumed, without the benefit of investigation, that the only mitigation he would be able to find was "something like he was a good boy and went to church." FHT 52; J.A. 63.

Trial counsel's conversation with Christopher Burger's mother, Ms. Betty Foster, was equally inadequate. He never initiated contact with her at all; in face he never informed her that her son was facing a capital murder trial. FHT 36, 75; J.A. at 50, 83. Leaphart spoke with her on only one occasion for approximately half an hour immediately prior to Petitioner's first trial. FHT 76; J.A. at 84. Even then the only inquiry he made was whether Petitioner had ever had any pscyhological examinations. She provided him with the requested information and he never spoke with her about the case again. FHT 76; J.A. at 84. He did not ask about Petitioner's background, the circumstances of his childhood or whether there were any potential mitigation witnesses for the penalty phase of Burger's trial. FHT 75-76; J.A. at 84. Furthermore, he never explained to her, before or during either trial, the nature of the penalty phase proceeding or the type of evidence admissible at such a proceeding. FHT 80; J.A. at 87.

The only other person familiar with Burger with whom Leaphart had contact was an attorney, Richard Halley, who was an acquaintance of Burger's family. FHT 78; J.A. at 85. As with Petitioner's mother, this contact was initiated by Mr. Halley, not defense counsel. When contacted by Ms. Foster, Richard Halley offered to travel to Georgia at his own expense to assist in whatever way he could. FHT 78; J.A. at 86. According to his own testimony, Leaphart refused the offer of assistance because Halley was black.[25]

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[25] Leaphart's testimony is as follows:

> Well, this particular lawyer was black. And, I felt that his close association with Mrs.—I didn't know what the association was, I'm not trying to imply there was—I felt that would have had in the environment there, would have had an ill effect on Mr. Burger's chances . . .
>
> Q. Purely because he was black?
>
> A. Purely because of the—I guess you would say that. . . . FHT 45; J.A. at 58.

Leaphart further attempted to justify his approach (or lack thereof) on the bases that it was his theory of defense to make the State prove its case, that if mitigating evidence had been offered he would have lost the right to both opening and closing argument, and that he chose to rely in closing argument on the fact that Petitioner had never been in trouble before and that this strategy would have been undercut by an investigation into and testimony concerning Petitioner's background.

Each stated reason is totally and utterly frivolous. His theory not to offer any mitigation evidence in order to preserve his right to opening and closing arguments is not only unreasonable but wrong. Ga. Code Ann. § 27-2503(a) & (c); O.C.G.A. § 17-10-2(a) & (c) which governs the conduct of capital sentencing proceedings in Georgia provides: "[t]he district attorney shall open and the defendant or his counsel shall conclude the argument." The presentation of evidence by the defendant at a capital sentencing proceeding in no way affects this division of argument between the State and the defense. This is in fact the procedure that was utilized at Burger's sentencing proceeding. R. Tr. 234, 250.

Again as to counsel's "strategic" choice to rely in closing argument on the theory that Burger had no prior record of violent crime and had never been in trouble before, the facts are otherwise. At Burger's second sentencing proceeding Leaphart at no point in his closing argument made reference to Burger's lack of a prior record.[26] What Leaphart did stress at the second sentencing proceeding in his closing argument was Burger's comparative lack of culpability and asked for the jury's mercy. It is difficult, if

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[26] Even had counsel made this argument, the simple fact is that Burger had no prior criminal record. No witness could have contradicted that fact.

not impossible, to perceive, however, how this argument would have been undercut by the presentation of humanizing evidence concerning Petitioner and his background.

Leaphart's failure to investigate and present mitigating evidence reveals that he failed to preceive the nature and purpose of the penalty phase.[27] His testimony at the evidentiary hearing reveals no understanding of strategic considerations involved in such a proceeding, which are significantly different than the considerations involved in the guilt/innocence phase of a bifurcated trial.[28] His failure to comprehend the distinctions resulted in an inadequate adversarial proceeding and undermine confidence in the reliability of this sentence of death.

3. Counsel's failure to investigate, prepare or present available mitigating evidence was both unreasonable and creates a reasonable probability that if the evidence had been presented, the Petitioner would have received a sentence of life imprisonment rather than the death penalty.

As was demonstrated above, counsel's reasons for failing to investigate, prepare or present mitigating evidence are patently unreasonable. The articulated "strategical" reasons for failing to present a mitigation case were incorrect. Petitioner did not gain the ability to present opening and closing arguments by failing to present evidence; even a cursory review of the Georgia death penalty statute would have demonstrated that. Counsel did not in fact argue that Petitioner had never been in trouble before at

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[27] At the evidentiary hearing Leaphart was not able to indicate the name or holding of any of this Court's decisions regarding capital punishment. FHT 31-32; J.A. at 46-47.

[28] *See* Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L.Rev. 299, 303-05 (1983).

the second sentencing trial. However, had he done so, the available mitigating evidence would have supported rather than undercut this form of advocacy.

The record is uncontradicted, that Burger had absolutely no prior criminal record. His only previous encounter with the law was that he had been adjudicated as a runaway. Finally, it is ludicrous to believe that counsel's decision to argue Burger's lesser culpability would have somehow been compromised by introducing evidence of Petitioner's low I.Q., and turbulent childhood. On the contrary such evidence would have given a factual basis to counsel's argument, i.e., that due to his mental shortcomings and constant rejection, Petitioner had no sense of self worth and would do almost anything to gain acceptance. Leaphart's conduct was clearly outside the "wide range of reasonable professional assistance." *Strickland*, *supra*, 466 U.S. at 689.

Not only was counsel's conduct unreasonable, there is a "reasonable probability that but for [Leaphart's] unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. The available mitigating evidence was compelling and because of counsel's failure to present it, the sentencing jury failed to see Petitioner as a human being. As this Court recognized in *Eddings* v. *Oklahoma*, 455 U.S. 104 (1982) this is exactly the type of information critical to a reliable determination of sentence in a capital proceeding involving a teenager.

> "Evidence of a difficult family history and of emotional disturbance is typically introduced by defendants in mitigation [cite omitted.] In some cases such evidence properly may be given little weight. But when the defendant was 16 years old at the time of the offense, there can be no doubt that evidence of a turbulent family history of beatings by a harsh

> father, and of severe emotional disturbance is particularly relevant.
>
> * * *
>
> . . . just as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered in sentencing."

Eddings, 455 U.S. at 115-116.

Due to trial counsel's failure to investigate or present available mitigating evidence the sentencing jury failed to consider Burger's background as a mitigating factor. In both *Eddings* and Petitioner's case, the sentence of death was imposed without consideration by the sentencers of a "particularly relevant" . . . "mitigating factor of great weight." *Eddings*, 455 U.S. at 114-116.

As this Court acknowledged in *Eddings*, the available mitigating evidence in this case is precisely the type of evidence which would warrant a sentence less than the death penalty. The sentencing jury, however, knew nothing of Petitioner's sympathetic and troubled youth and the unusual features of his upbringing that affected his formative development, and, therefore, was forced to make a decision regarding our society's "ultimate penalty" without any evidence as to his background, character and upbringing to enlighten their decision.

Therefore, the jury's "highly subjective, unique, individualized judgment," *Turner* v. *Murray*, *supra*, was skewed because counsel failed to provide the jury with the most relevant information. Due to counsel's errors the sentencing process at Petitioner's trial did not facilitate the reliable exercise of sentencing discretion. *Caldwell* v. *Mississippi*, 105 S.Ct. at 2639. Certainly this evidence

creates "a reasonable probability that absent [counsel's] errors [the jury] . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant [the] death [penalty]." *Strickland* v. *Washington*, 466 U.S. at 695.

II. THIS COURT'S DECISION IN *FRANCIS* v. *FRANKLIN*, AND *ROSE* v. *CLARK*, REQUIRES THAT PETITIONER RECEIVE A NEW TRIAL.

1. The Malice Instruction In Light Of *Francis* v. *Franklin*.

Petitioner was found guilty of malice murder, defined in Georgia as causing the death of another "unlawfully and with malice aforethought, either express or implied." Ga. Code Ann. § 26-1101(a); O.C.G.A. § 16-5-1(a). The trial court's charge regarding malice and intent[29] was as follows:

> *I charge you now the presumptions that are rebuttable.* Every person is presumed to be of sound mind and discretion. *The acts of a person of sound mind and discretion are presumed to be the products of the person's will. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts.* A person will not be presumed to act with criminal intention, but the jury may find such intention upon consideration of the words, conduct, demeanor, motive and all other circumstances connected with the act for which they (sic) accused is prosecuted.
>
> A specific intent to commit the crime charged in this indictment is an essential element that the State must prove beyond a reasonable doubt. Intent is

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[29] Pursuant to Georgia law, malice and intent are essential elements of malice murder. Ga. Code Ann. § 26-1101(a); OCGA §16-5-1(a).

> always a question for the jury, and is ordinarily ascertained by acts and conduct. Intent may be shown in many ways, provided the jury finds that it existed from the evidence produced before you. It may be inferred from the proven circumstances, or by acts and conduct, or it may be presumed when it is the natural and necessary consequences of the act.
>
> Tr. at 410-411; J.A. at 25 (emphasis added).

The constitutional deficiency of the malice instruction given at Petitioner's trial is clearly established by this Court's holding in *Francis* v. *Franklin*, 472 U.S. ____, 105 S.Ct. 1965 (1985). Franklin, a prison escapee, killed a homeowner during an attempt to steal the victim's car. His defense was that he had not intended to kill the victim but rather that the gun had accidentally discharged. The trial court charged the jury regarding intent:

> A crime is a violation of a statute of this State in which there shall be a union or joint operation of act or omission to act, and intention or criminal negligence. A person shall not be found guilty of any crime committed by misfortune or accident where it satisfactorily appears there was no criminal scheme or undertaking or intention or criminal negligence. *The acts of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be rebutted. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts, but the preseumption may be rebutted.* A person will not be presumed to act with criminal intention but the trier of facts, that is, the Jury, may find criminal intention upon a consideration of the words, conduct, demeanor, motive and all other circumstances connected with the act for which the accused is prosecuted. *Francis* v. *Franklin*, 105 S.Ct. at 1969-1970 (Emphasis added).

This Court, after examining the charge as a whole in order to determine whether other parts of the charge

cured the error,[30] concluded that the charge was a mandatory rebuttable presumption that impermissibly relieved the State of its proper burden of proof on the issue of malice. *Id.* at 1972-73.

The same instruction found constitutionally lacking in *Franklin* was given, virtually verbatim, at Christopher Burger's trial.[31] Tr. 410-411. There can be no serious

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[30] Immediately after the two instructions concerning the presumption of intent, the trial judge had instructed the jury that "[a] person will not be presumed to act with criminal intention . . ." In addition, he had repeatedly stressed that the burden of proof was on the state. Nevertheless, this Court found that the jury might reasonably have interpreted the charge as a whole to mean that "although intent must be proved beyond a reasonable doubt, proof of the firing of the gun and its ordinary consequences constituted proof of intent beyond a reasonable doubt unless the defendant persuaded the jury otherwise." 105 S.Ct. at 1974.

As for the instruction that a person was not to be presumed to act with criminal intent, this Court observed that the jury might have understood this to refer to a different element of the offense than that referred to in the preceding instructions on the presumption of intent. Alternatively, the jury might simply have understood this instruction to contradict the mandatory presumption which immediately preceded it. Since "[n]othing in these specific sentences or in the charge as a whole makes clear to the jury that one of these contradictory instructions carries more weight than the other . . . the jury was left in a quandary as to whether to follow that instruction or the immediately preceding one its contradicted." 105 S.Ct. at 1975-76. Under either interpretation, this Court was unable to conclude that the instructions could not have operated to shift the burden of proof in violation of the Due Process Clause.

[31] The above instruction was followed by a further instruction, which stated:

> A specific intent to commit the crime charged in this indictment is an essential element that the State must prove beyond a reasonable doubt. Intent is always a question for the jury, and is ordinarily ascertained by acts and conduct. Intent may be shown in many ways, provided the jury finds that it existed from the evidence produced before you. It may be inferred from the

dispute that the instruction was defective.[32]

2. The Constitutional Error Was Not Harmless Beyond A Reasonable Doubt.

In *Rose* v. *Clark*, ___ U.S. ___, 106 S.Ct. 3101 (1986), this Court determined that a constitutionally impermissible burden shifting instruction could, under certain circumstances, be harmless error. In making the harmless error determination the Court adopted the harmless error standard of *Chapman* v. *California*, 386 U.S. 18 (1967). *Rose*, 106 S.Ct. at 3107.

Pursuant to *Rose*, a court reviewing the effect of a burden shifting instruction must determine "whether the evidence is so dispositive of intent that [the] reviewing court can say beyond a reasonable doubt that the jury would have found it unnecessary to rely on the presumption" *Id.* at 3109 quoting *Connecticut* v. *Johnson*, 460 U.S. 73, 97, n.5 (Powell, J., dissenting) (1983) *see also*, *Chapman*, *supra*, 386 U.S. at 24. Therefore, in order to render the charge harmless beyond a reasonable doubt, the evidence of intent must be so overwhelming that the reviewing court can conclude that the jury did not rely on the presumption.

---

proven circumstances, or by acts and conduct, or it may be presumed when it is the natural and necessary consequences of the act.

Burger v. *Zant*, 513 F.Supp. 772, 792, (S.D. Ga. 1981). In *Franklin*, this Court determined that "[l]anguage that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity" because a reviewing court has no way of knowing which of the two irreconcilable instructions the jurors applied in reaching their verdict." 105 S.Ct. at 1975.

[32] The divided panel opinion acknowledged that the "jury instruction in this case is virtually identical to the one held unconstitutional in *Franklin*." 785 F.2d at 891.

The majority of the divided panel in this case held that any error in the instruction was harmless because Petitioner did not expressly raise the issue of intent and thus left "uncountered the strong implication of intent which was bound to arise from the evidence presented by the State." 785 F.2d at 892.

A review of the transcript of the guilt/innocence phase of Petitioner's trial discredits the divided panel's conclusion. First, the evidence demonstrated that Petitioner's co-defendant, Stevens, was the planner, instigator and primary actor in the offense.[33] The essence of this line of defense was that although Burger took part in the offense, he did so under the direction and domination of Stevens, and did not have, therefore, the requisite intent.

Petitioner's confession, introduced into evidence at trial (Tr. 278-86), stated that the crime was Stevens' idea. He obtained the weapons and took the money from Honeycutt. Stevens alone sexually assaulted the victim. Burger resisted when Stevens stated that Honeycutt would have to be killed. The State's primary witness, Mr. Botsford, testified that when he asked Stevens and Burger not to kill the victim, Petitioner readily agreed. Botsford was asked:

> Q. In fact, Stevens was the one that was doing all the talking, wasn't he?
>
> A. Most of it.
>
> Q. And Burger was just sorta going along, sorta doing sorta like Stevens was telling him to do, wasn't he?

---

[33] The district court concluded that an examination of the trial record indicated considerable effort to point Stevens as the "chief architect" of the crime. 513 F. Supp. at 795.

A. Sorta.

Q. I think when you said something about turning the cab driver loose, Burger agreed that was the thing that should be done?

A. That's correct. Tr. 111.

It was Stevens who directed Petitioner to drive the cab into the water. After running the taxi into the pond, Burger started to walk away and told Stevens he was leaving. Stevens, however, ordered Petitioner to stay in order to make sure that the car went down.

What the above review of the evidence makes clear is that Petitioner presented considerable evidence that his participation in the crime was under the domination, direction and control of Stevens. Certainly this goes to the issue of intent and the jury may well have relied upon the presumption to have found malice, i.e., that a person is presumed to intend the natural and probable consequences of his acts.

Second, there was evidence in the record that Burger was extremely intoxicated at the time of the offense. The evidence was uncontradicted that he and Stevens had consumed four or five pitchers of beer at a club that evening. They drank until they ran out of money. It was only then that Petitioner agreed to go along with Stevens' plan to rob a taxicab driver. Evidence of intoxication, such as that presented here, goes squarely to the issue of intent. *See Thomas* v. *Kemp*, 766 F.2d 452, 455-6 (11th Cir. 1985), *vacated and remanded*, ___ U.S. ___, 106 S.Ct. 3325 (1986), *on remand*, 800 F.2d 1024 (11th Cir. 1986); *see also*, *Pope* v. *State*, 256 Ga. 196, 345 S.E.2d. 831, 843-4 (1986) (evidence of intoxication may negate intent; State has the burden of proof on the issue).

Under all the circumstances and evidence presented at Petitioner's trial the error was not harmless beyond a reasonable doubt. The burden shifting malice instruction allowed the jury to presume malice on Burger's part as the "natural and probable consequences of his acts" despite substantial record evidence that he was an intoxicated minor acting under the direction of another. The constitutionally deficient instruction in light of the evidence presented at Petitioner's trial compels the conclusion that the State cannot show "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman, supra*, 386 U.S. at 23-24.

CONCLUSION

For the foregoing reasons, Petitioner submits that this Court should reverse the judgment of the Court of Appeals.

Respectfully submitted,

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No. 86-5375

In The
Supreme Court of the United States
October Term, 1986

CHRISTOPHER A. BURGER,
Petitioner,

v.

RALPH KEMP, WARDEN, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

1.

Is trial counsel's representation *per se* ineffective when there is no joint representation and no conflict of interest, but an attorney with whom counsel is professionally associated represents a co-indictee at a separate trial?

2.

Is trial counsel *per se* ineffective when, after a thorough investigation and consultation with his client, counsel makes a sound strategic decision, uncontested by the defendant, not to present marginal and potentially damaging character evidence on the sentencing phase of a capital trial?

3.

Does the inclusion of talismanic words and phrases in a trial court's charge on an element of the offense *ipso facto* render the charge unconstitutionally burden-shifting, or must the charge be reviewed in its entirety to ascertain any alleged unconstitutional burden-shifting effect?

4.

Does *Rose v. Clark*, — U.S. —, 106 S.Ct. 3101 (1986), mandate a finding of harmless error as to an alleged burden-shifting charge where the evidence is overwhelming?

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In The

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CHRISTOPHER A. BURGER,

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RALPH KEMP, WARDEN, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

STATEMENT OF THE CASE

The Petitioner was convicted of murder in the Superior Court of Wayne County, Georgia on January 25, 1978, at the conclusion of a jury trial that commenced on January 23, 1978. A sentence of death was imposed. On direct appeal to the Supreme Court of Georgia Petitioner's conviction was affirmed; however, Petitioner's sentence of death was vacated and a new trial was ordered as to sentencing in *Burger v. State*, 242 Ga. 28, 247 S.E.2d 834 (1978).

The Petitioner was subsequently retried on the issue of punishment before a jury commencing on July 16, 1979. On July 19, 1979, the Petitioner was again sentenced to death. On direct appeal the Supreme Court of Georgia

affirmed the Petitioner's sentence in *Burger v. State*, 245 Ga. 458, 265 S.E.2d 796, *cert. denied*, 448 U.S. 913 (1980).

State habeas corpus relief was denied on October 1, 1980. On October 2, 1980, the Petitioner filed an application for habeas corpus relief in the United States District Court for the Southern District of Georgia, Brunswick Division. On April 29, 1981, the district court denied habeas corpus relief as to Petitioner's conviction, but granted partial relief in the form of an Order vacating Petitioner's sentence of death. *Burger v. Zant*, 513 F.Supp. 772 (S.D. Ga. 1981). The grant of relief was based solely upon the circuit court's decision in *Stephens v. Zant*, 631 F.2d 397, *modified on panel rehearing*, 648 F.2d 446 (5th Cir. 1981), *reversed, Zant v. Stephens*, 462 U.S. 862 (1983).

Pursuant to a timely appeal and cross-appeal by the Respondent and Petitioner respectively, the United States Court of Appeals for the Eleventh Circuit rendered its opinion on October 13, 1983, reversing the district court's grant of habeas corpus relief and adopting those portions of the district court's order denying relief. *Burger v. Zant*, 718 F.2d 979 (11th Cir. 1983). On February 13, 1984, Petitioner's petition for rehearing and suggestion for rehearing *en banc* was denied.

On May 29, 1984, this Court granted certiorari and remanded for reconsideration in light of *Strickland v. Washington*, 466 U.S. 668 (1984). *Burger v. Zant*, — U.S. —, 104 S.Ct. 2652 (1984). The circuit court remanded this matter to the district court for reconsideration as required by this Court's order. *Burger v. Zant*, 741 F.2d 1274 (11th Cir. 1984). After reexamination of the effective assistance of counsel issue in light of *Strickland v. Washington*,

supra, the district court again found no constitutional error.

On February 5, 1985, the circuit court affirmed the district court's finding that Petitioner was in fact rendered the effective assistance of counsel. *Burger v. Kemp,* 753 F.2d 930 (11th Cir. 1985). Petitioner's petition for rehearing *en banc* was denied on March 25, 1985.

Petitioner again petitioned this Court for a writ of certiorari upon claims of ineffective assistance of counsel and the existence of an allegedly burden-shifting charge. In *Burger v. Kemp,* — U.S. —, 106 S.Ct. 41 (1985), this Court granted certiorari and remanded for reconsideration in light of *Francis v. Franklin,* 471 U.S. —, 105 S.Ct. 1965 (1985), on the burden-shifting charge issue. Upon reconsideration, and in light of this Court's then very recent opinion in *Rose v. Clark,* — U.S. —, 106 S.Ct. 3101 (1986), the circuit court assumed the trial court's charge on intent was unconstitutionally burden-shifting, but found the same to be harmless beyond a reasonable doubt. *Burger v. Kemp,* 785 F.2d 890 (11th Cir. 1986), *rehearing denied,* 796 F.2d 1313 (11th Cir. 1986).

On November 3, 1986, this Court granted Petitioner's application for a writ of certiorari. This brief by the Respondent follows.

———o———

STATEMENT OF FACTS

James Botsford, an army tank driver stationed at Fort Stewart, Georgia, had known Petitioner and co-indictee Thomas D. Stevens in Army Basic Training. (T. 85-88).[1] Arriving at the Savannah Airport on September 4, 1977, Botsford telephoned the army base at approximately 10:00 p.m. to ask about getting a ride from the airport to Fort Stewart. (T. 88-89, 90). He spoke to Petitioner who told Botsford that Petitioner and Stevens would pick him up at the airport. (T. 89). About two hours later Petitioner and Stevens arrived at the airport in a cab which Petitioner was driving. (T. 90). After Botsford got in he was told by Petitioner and Stevens that the cab was stolen. (T. 91, 95). Petitioner also told Botsford that the victim was locked in the trunk of the cab. (T. 96).

Stevens informed Botsford that Stevens and Petitioner had used a knife and knife sharpener to force the cab driver to give them money and to perform "unnatural acts." (T. 96). With Petitioner driving, Stevens did most of the talking, but Petitioner voiced his agreement with what was said. (T. 93). Stevens then called back to the trunk: "Are you still there?" Botsford heard a reply, "Yes sir." (T. 97). Stevens showed Botsford the knife and knife sharpener, which Stevens pulled from underneath the front seat. (T. 97).

During the ride back to Fort Stewart, Stevens called back to the trunk three or four times asking the victim if he was there. (T. 103). Botsford always heard a voice an-

---

[1]The transcript references in the following statement of facts are to the transcript of the original trial of January 23 through 25, 1978.

swer. (T. 103). Botsford further testified that Stevens explained in detail how he had sexually assaulted the victim and suggested that he [Stevens] and Burger kill the victim and burn the car. (T. 100, 101). Botsford asked Petitioner and Stevens to free the victim and he told them that he would not contact the police if they would not kill the cab driver. (T. 100-104). Petitioner and Stevens both agreed to let the victim go and ditch the cab. (T. 100, 104).

The following evening, Botsford was visited outside his barracks by fellow soldiers Petitioner and Stevens, who asked him if he had said anything. (T. 105-106). When Botsford told them he had not, they said they had freed the cab driver and ditched the cab near Hinesville, Georgia. (T. 107). Prompted by a radio bulletin that he later heard regarding a missing cab driver, Botsford went to the State Patrol and the Army Criminal Investigation Division with the information he possessed. (T. 108-109).

An army investigator, John Berzenski, was notified on September 6, 1977, of a missing cab and driver. (T. 134). Roger Honeycutt, the missing cab driver, was an army private also stationed at Fort Stewart, Georgia. (T. 121). He drove for the D&M Cab Company on nights and weekends. (T. 120-121).

Case agent Clarence Haire, also an army investigator, questioned members of Honeycutt's unit in the unit's orderly room on September 9th, in an attempt to locate Honeycutt. (T. 149). One of the men he questioned was Petitioner, who told Haire that he knew nothing about a D&M Cab, but that he and a friend called the Shuman Cab Company at about 10:00 p.m. on September 4th, but decided not to take the cab when it arrived at Fort Stewart. (T. 149-150). A Shuman cab driver testified at trial that he

did in fact get a call from Fort Stewart on September 4th, and, in response thereto, he drove to Fort Stewart accompanied by a friend. (T. 129-130). Two soldiers asked the driver if he had change for $50.00. The two soldiers then turned and walked away. (T. 130, 131). The two soldiers had told the driver that they were going to the airport. (T. 130). As the Shuman cab driver was leaving, the driver saw a D&M cab drive away from a nearby building at about 10:15 or 10:20 p.m. (T. 131).

On September 12, 1977, army investigators Berzenski and Haire found a boot along Highway 144 while traveling toward the Savannah Airport. The name of Roger Honeycutt was sewn inside the boot. (T. 134, 135, 136, 141). They found another boot, army socks and a piece of yellow plastic within 200 yards of each other along Highway 144. (T. 137-138, 144-147).

A Jackson-Denno hearing was held at trial to determine the voluntariness of Petitioner's confession made to Investigator Haire and Wayne County Detective F.J. Shuman. (T. 169-268). The trial court heard testimony from Investigator Haire, Detective Shuman and defense witness Dr. Joseph O'Haire, a clinical psychologist. The police officers testified regarding the voluntariness of Petitioner's statements.

Dr. O'Haire testified that Petitioner possessed a "mental deficiency" and a "psychopathic personality." (T. 248, 250). Dr. O'Haire also testified that while Petitioner understood the difference between right and wrong (T. 256), Petitioner was simply determined to do evil (T. 250), and would actually enjoy confessing his crimes to whomever would listen. (T. 250). Dr. O'Haire testified

that due to Petitioner's propensity towards violence, continued incarceration was required. (T. 248).

After hearing the testimony, the court ruled that the statements were voluntarily made. (T. 268). The jury returned to the courtroom.

Investigator Haire testified that he interviewed the Petitioner at 9:20 p.m. on September 12th, commencing with advising Petitioner of the *Miranda* warnings and the fact that the questioning would concern a missing cab driver. (T. 269-270). Petitioner, having been advised that he was charged with murder and sodomy, stated that he did not want a lawyer and would answer any questions posed, after which he read and signed a waiver of rights form. (T. 272-273). Initially, Petitioner denied any knowledge of Roger Honeycutt or Honeycutt's disappearance. (T. 276, 278). When informed that there existed information that he had been in possession of the missing cab, Petitioner made a confession. (T. 278). Investigator Haire related the contents of Petitioner's confession to the court and to the jury.

Petitioner stated that when he and Stevens ran out of money while drinking beer at the Enlisted Men's Club, Stevens suggested robbing a cab driver. (T. 278-279). The two men summoned a Shuman Company cab, but decided not to take it when it arrived with two men inside. (T. 279). Petitioner and Stevens then received a telephone call from Botsford, who was at the Savannah Airport, requesting a ride to Fort Stewart. Petitioner told Botsford that he and Thomas Stevens would pick him up at the airport. (T. 279).

Stevens and Petitioner both burglarized the dining hall where Stevens got a knife sharpener and Petitioner stole a twelve inch butcher knife. (T. 154, 278). Thus

armed, the two men telephoned and requested a D&M cab. (T. 280). When the cab arrived, Petitioner and Stevens asked the driver if he could change a $50.00 bill; the driver said he could. (T. 280). Approximately fifteen miles away from the army base on Highway 144, as planned by a prearranged signal, Stevens placed the knife sharpener to the driver's neck while Petitioner put the butcher knife to the driver's ribs. (T. 280).

The driver was forced to pull over, to get out, and to give Petitioner and Stevens all of his money. When the driver gave Petitioner and Stevens only $16.00 they asked the driver if he had more money; when he said that he did not, they searched the cab and then forced the driver into the back seat. (T. 281). While en route to the airport, with Petitioner driving, Stevens had the driver remove his boots and clothes which Stevens searched for money. (T. 281). Stevens threw each item of clothing out of the window after searching it. (T. 281).

While Petitioner drove, Stevens forced the nude victim, Roger Honeycutt, to perform oral sodomy on Stevens. (T. 282). Stevens then anally sodomized the victim. (T. 282). While Roger Honeycutt was being sexually assaulted, Petitioner asked the victim for directions to the airport. (T. 282). Before reaching the airport, Petitioner stopped the car; Petitioner and Stevens blindfolded Roger Honeycutt, tied the victim's hands with cord cut from the C.B. radio and then forced the nude victim into the trunk of the cab. (T. 282, 286). Petitioner and Stevens proceeded to the Savannah Airport to pick up their friend Botsford.

Because there was a police car at the entrance to the airport terminal, Petitioner parked the cab in the parking

lot. (T. 283). Stevens got out of the cab and later returned with Botsford. En route to Fort Stewart, with Petitioner driving, Petitioner and Stevens bragged to Botsford that they had stolen the cab and still had the bound driver locked in the trunk. (T. 283). In order to convince Botsford of the truth of their story, Petitioner and Stevens called back to their victim for a response. (T. 283). Stevens suggested that he and Burger kill the victim. Botsford protested and asked them not to kill the victim. Petitioner said that maybe they should just let him go. (T. 284).

After dropping Botsford off at Fort Stewart, Georgia, Petitioner and Stevens went to Jesup, Georgia. While driving up and down several dirt roads Petitioner made the car go "from side to side," in order to force the victim to roll around in the trunk. (T. 284). The two men then stopped at a Jack's Minit Market where Stevens purchased sandwiches and milk, removed the cab's dome light and hid it in some bushes. (T. 284). When Petitioner saw a patrol car, he got out of the cab and walked into the store. After the patrol car left, Petitioner and Stevens got back in the stolen cab and Petitioner drove away. (T. 284-285).

After noticing a patrol car following them, Petitioner and Stevens decided to get rid of the cab. (T. 285). Petitioner drove to a "borrow pit" where he and Stevens had gone swimming several times in the past. Petitioner and Stevens removed the cab's C.B. radio, after which they were careful to wipe their fingerprints from every area of the cab. (T. 286).

While Stevens was off hiding the C.B. radio in the bushes, Petitioner raised the lid of the trunk and asked the

victim if he was "all right." The victim responded, "Yes, sir." Petitioner then closed the lid of the trunk. (T. 345-346). (J.A. at 17-18). Petitioner immediately started the engine and drove the cab into the borrow pit, jumping from it just before impact with the water. (T. 286, 289). Petitioner and Stevens waited at the scene of the murder, watching the cab to make certain that it sank beneath the surface. (T. 286, 345). Petitioner candidly admitted that he killed the cab driver to prevent the driver from later identifying him and Stevens. (T. 287). (J.A. at 13).

Haire and two other men from the Criminal Investigation Division, pursuant to Petitioner's directions and accompanied by Petitioner, drove to the borrow pit. (T. 289). Shortly afterwards, Detective Mike Deal arrived at the borrow pit where the missing cab was ultimately recovered. (T. 152, 161). A knife and a knife shapener were found on the right floorboard of the cab. (T. 157, 158). A nude decomposing body found in the trunk of the car was subsequently identified as that of Roger Honeycutt. (T. 306, 308, 311). The cause of death was drowning. (T. 308).

Wayne County Detective F.J. Shuman testified at trial that he took Petitioner from Fort Stewart authorities to the Wayne County Jail on September 13, and advised Petitioner of the *Miranda* warnings. (T. 319-320). Shuman and Petitioner went over Petitioner's statement to Haire word-by-word, and Petitioner affirmed to Shuman everything contained in the statement. (T. 322). Petitioner also added that he and a friend, Mark E. Baldwin, had returned to the borrow pit to get the cab's C.B. radio, and that the radio was in Petitioner's mother-in-law's automobile. (T.

323). The radio was in fact recovered from Petitioner's mother-in-law's stationwagon. (T. 323).

On September 14, Petitioner directed Wayne County authorities over the same route that he had driven the stolen cab. (T. 325). The cab's dome sign was recovered from bushes near a convenience store and the yellow plastic found on Highway 144 was determined to have come from that dome sign. (T. 326, 328, 329).

Further facts will be developed as needed to further illuminate the issues raised herein.

SUMMARY OF THE ARGUMENT

Petitioner and Thomas D. Stevens were co-indicted for the malice murder of Roger Honeycutt. Mr. Alvin Leaphart, a local attorney experienced in capital litigation, was appointed to represent Petitioner. Mr. Robert Smith, Mr. Leaphart's law partner, was separately appointed to represent Thomas D. Stevens. In preparation for trial Mr. Leaphart made favorable use of Mr. Smith's energies and expertise in that he shared the burdens of the legal research with Mr. Smith, discussed legal issues and interviewed co-indictee Stevens in hopes of ascertaining any information favorable to Petitioner. At all times Mr. Leaphart considered himself as counsel solely for Petitioner.

Petitioner was tried first and separately from co-indictee Stevens. At trial Mr. Leaphart portrayed Stevens as the more culpable party and the architect of the criminal enterprise. Mr. Leaphart's uncontradicted testimony

was that if crucifying Thomas D. Stevens at Petitioner's trials would have helped Petitioner, he would have done it. Mr. Leaphart tried Petitioner's cases in their entireties and took absolutely no part in the trials of co-indictee Stevens.

As counsel for Petitioner, Mr. Leaphart attempted to negotiate a guilty plea for a reduced sentence; however, the district attorney flatly refused to discuss plea negotiations on any level. Therefore, Mr. Leaphart was never afforded the opportunity to engage in plea negotiations on Petitioner's behalf in any manner.

Mr. Leaphart's efforts as appellate counsel successfully resulted in the vacating of Petitioner's original sentence of death by the Supreme Court of Georgia. After reimposition of the death sentence, following Petitioner's retrial on sentencing, Mr. Leaphart raised every allegation on appeal that he could identify. Because Petitioner was the actual "triggerman," Mr. Leaphart, experienced trial counsel, astutely noted the frivolity of arguing Petitioner's alleged lesser culpability before the appellate court.

While Mr. Leaphart made favorable use of Mr. Smith's assistance and expertise, these actions cannot be construed as the legal representation of Thomas D. Stevens by Mr. Leaphart. Because Petitioner and Stevens were represented by separate counsel, at separate trials, before juries aware only of the issues and legal defenses presented in the proceedings before them, and because there existed no conflict in the defenses presented by Petitioner and his co-indictee, there existed no actual conflict of interest. Further, because Mr. Leaphart, at Petitioner's trials, vigorously portrayed Stevens as the architect and prime mover

behind the murder and Petitioner as merely a younger follower, it cannot reasonably be contended that Mr. Leaphart tailored his defense of Petitioner so as to protect co-indictee Thomas D. Stevens. Neither can it reasonably be contended that Mr. Leaphart's decision, as an experienced attorney, not to argue Petitioner's alleged lesser culpability on appeal, where the evidence reflects that Petitioner was the actual "triggerman," was the result of Mr. Leaphart's alleged desire to protect Thomas D. Stevens. The facts simply do not support Petitioner's contentions that Mr. Leaphart jointly represented Petitioner and his co-indictee. that at their separate trials Petitioner's and Stevens' defenses were conflicting or that Mr. Leaphart tailored his actions so as to protect Thomas D. Stevens.

In preparation for the sentencing phase of Petitioner's trials, Mr. Leaphart conducted a thorough investigation for potentially mitigating evidence. Counsel was able to ascertain only evidence of marginal value and which carried with it the possibility of extremely damaging effects if the witnesses were subjected to a thorough and sifting cross-examination by the district attorney. After consultation with the Petitioner and Petitioner's mother, trial counsel made a strategic decision, uncontested by the defendant at trial, not to present this potentially damaging evidence. Instead, counsel elected to emphasize the disparities between Petitioner's age and that of his co-indictee, and the disparities in the number and severity of criminal offenses committed by Petitioner, as compared to his co-indictee. Counsel is not *per se* ineffective for making a sound strategic decision not to present potentially damaging evidence on the sentencing phase of trial, after hav-

ing made a thorough investigation and after consultation with his client.

Though Petitioner identifies two talismanic sentences contained in his charge which were also contained in another trial court's charge ultimately found to be unconstitutionally burden-shifting by this Court, the same does not automatically mandate a finding that Petitioner's charge on intent was unconstitutionally burden-shifting. In order to ascertain any alleged unconstitutional burden-shifting effect, Petitioner's trial court's charge must be reviewed in its entirety. A proper review of Petitioner's charge reveals that the same is constitutionally distinguishable from those prior charges found by this Court not to pass constitutional muster, and that the Petitioner's charge on intent is not unconstitutionally burden-shifting. Even assuming the subject charge is unconstitutionally burden-shifting, the error is harmless beyond a reasonable doubt. The evidence in this case reveals a preplanned kidnapping and armed robbery perpetrated by Petitioner and his co-indictee. The victim was orally and anally sodimized, after which he was bound and placed nude in the trunk of a car where he was kept for approximately five hours. At the conclusion of this ordeal, Petitioner sadistically opened the trunk of the car and asked the victim if he was "all right." When the victim replied "Yes sir," the Petitioner closed the trunk of the car, entombing the victim, started the engine, and then drove the car into a pit filled with water, and then jumped from the car just before impact. Petitioner and his co-indictee stood on the bank in order to make certain that the car sank totally beneath the surface of the water. The victim died from drowning. Under no interpretation of these heinous facts could it rea-

sonably be contended that Petitioner's intent to unlawfully kill the victim was not proven beyond a reasonable doubt.

ARGUMENT

I. THERE OCCURRED NO MULTIPLE REPRESENTATION OF CONFLICTING INTERESTS AND NO CONFLICT OF INTEREST ADVERSELY AFFECTED TRIAL COUNSEL'S PERFORMANCE.

A. Mr. Leaphart did not represent Thomas D. Stevens.

Petitioner contends that his trial counsel simultaneously represented Petitioner's interests and those allegedly conflicting interests of his co-indictee. This alleged multiple representation of allegedly conflicting interests, Petitioner contends, gave rise to an actual conflict of interest and denied Petitioner his Sixth Amendment right to the effective assistance of counsel. The district court and the circuit court, however, found no multiple representation, no conflicting interests and no actual or potential conflict of interest.

On March 4, 1981, the federal district court conducted an evidentiary hearing for the specific purpose of affording Petitioner an opportunity to factually support his allegations of a conflict of interest and the alleged ineffectiveness of trial counsel's representation. (J.A. 29-96, 112). After observing the demeanor of the witnesses, assessing their credibility and perusing documentary evidence and exhibits submitted, the district court found Petitioner's

claim of a conflict of interest to be totally without merit. In its orders denying relief on this claim the district court made factual findings which this Court should accept as the same are amply supported by the record and are not clearly erroneous. *See United States v. United States Gypsum Co.*, 333 U.S. 364, 394-395 (1948). The circuit court adopted the district court's opinions denying habeas corpus relief.

In its April 29, 1981, and October 10, 1984, orders the district court credited the testimony of Petitioner's trial counsel, Mr. Alvin Leaphart. (J.A. 112-114; 177-181). Mr. Leaphart had been in practice since 1963, after having clerked for a year and a half. Mr. Leaphart had served as a state court judge, the county attorney for Wayne County, Georgia and counsel for the Wayne County Board of Education. He was a member of the Board of Governors of the State Bar Association of Georgia and a member of the Georgia Trial Lawyers Association and the American Trial Lawyers Association. Prior to representing Petitioner, Mr. Leaphart had represented other criminal defendants against whom the death penalty had been sought under Georgia's present capital punishment statute. In those cases he had been successful in obtaining sentences less than death, and in one instance he obtained an acquittal. (J.A. 68-69).

Mr. Leaphart and his partner in a three person law firm, Mr. Robert B. Smith, were separately appointed to represent Petitioner and his co-indictee respectively. (J.A. 30-31). Petitioner and Stevens had separate trials with Petitioner tried first.[2] Petitioner's confession and Private

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[2]Stevens was tried separately, convicted and is presently under a sentence of death. *Stevens v. State*, 245 Ga. 583, 266 S.E.2d 194 (1980), *cert. denied*, 449 U.S. 891 (1980).

Botsford's testimony were the primary sources of evidence at Petitioner's trials. Petitioner did not testify, nor was evidence of co-indictee Stevens' confession or its contents made known to the juries at Petitioner's original trial or the retrial on sentencing.

During his representation of Petitioner, Mr. Leaphart interviewed co-indictee Thomas D. Stevens. (J.A. 32). Although Petitioner at pages 13 and 20 of his brief characterizes this interview as an attorney-client conference, the record evidence belies this assertion. The record shows, and the district court found, that Mr. Leaphart interviewed Stevens solely in his capacity as counsel for Petitioner Burger. (J.A. 177-178, 51, 65). In preparing Petitioner's case for trial Mr. Leaphart made use of Mr. Smith's talents and expertise in that he and Mr. Smith shared the legal research, discussed the issues and Mr. Smith sat with and assisted Mr. Leaphart during the trial of Petitioner's case. (J.A. 35, 36, 177). Mr. Leaphart, on the other hand, took no part in the subsequent trial of Stevens. (J.A. 35, 177).

Mr. Leaphart and Mr. Smith "collaborated" on preparation of the appelllate briefs, with Mr. Leaphart being primarily responsible for the physical preparation of the briefs on appeal from reimposition of the death penalty. (J.A. 54).

Mr. Leaphart clearly testified that he understood what a conflict of interest was and how it could impact on counsel's representation. (J.A. 34). Mr. Leaphart testified, "nothing ever arose that I felt was a conflict." (J.A. 72). Neither Mr. Leaphart, Mr. Smith, the trial court or Petitioner ever raised the possibility of a conflict of interest. (J.A. 32, 179). The district court found as fact that Mr.

Leaphart, via timely objections and motions, went to great pains to create a distinction in the minds of the jurors between those criminal acts performed by Petitioner and those performed by Stevens. (J.A. 72-73, 114, 177). Through continuous objections and cross-examination Mr. Leaphart sought to establish that "Stevens initiated the whole thing and that Burger was merely following his instructions." (J.A. 38, 72-73, 114, 177). Mr. Leaphart sought to distance Petitioner from those aggravating acts of oral and anal sodomy performed on the victim by Stevens. This consistent strategic approach by Mr. Leaphart manifested itself through all phases of the trial, including closing arguments.

On the retrial on sentencing Mr. Leaphart prepared and used a chart which listed Petitioner and his co-indictee side-by-side, graphically displaying the disparity in their ages and in the number and severity of the criminal acts that each performed. (J.A. 37-39). (*See* Plaintiff's Exhibit No. 1 from the federal evidentiary hearing.) Via the use of this chart Mr. Leaphart sought to tangibly portray Stevens as the "architect" of the crime and the prime mover behind the murder.

Petitioner failed to show that any attorney other than Mr. Leaphart authored and filed the many pretrial and post-trial pleadings on Petitioner's behalf. An examination of the transcripts of Petitioner's original trial and retrial on sentencing reveals that Mr. Leaphart alone vigorously tried Petitioner's cases in their entireties. Petitioner failed to show that Mr. Leaphart ever appeared or participated as counsel for co-indictees Stevens at Stevens' subsequent trial and retrial on sentencing. Similarly, Petitioner produced no evidence that Mr. Leaphart ever billed

the county for services rendered on behalf of any defendant other than Petitioner.

This Court has long recognized the Sixth Amendment's guarantee of the right to effective assistance of counsel. *Powell v. Alabama*, 287 U.S. 45 (1932); *McMann v. Richardson*, 397 U.S. 759, n. 14 (1970). Until its decision in *Strickland v. Washington*, 466 U.S. 668 (1984) the Court had not, however, elaborated on the meaning of the requirement of "effective assistance." In *Strickland, supra*, the Court set forth a two-prong analysis for testing the merits of a convicted defendant's claim of ineffectiveness of counsel. First, the defendant must show that counsel's performance was deficient, i.e., that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance of counsel actually prejudiced the defense, i.e., that counsel's errors were so serious as to deprive the defendant of a trial whose result is reliable. *Strickland* at 687.

In certain Sixth Amendment contexts prejudice is presumed, i.e., actual or constructive denial of the assistance of counsel altogether, or those situations involving various kinds of state interference with counsel's assistance. *Strickland* at 692. Specifically regarding conflict of interest claims, the Court, citing its earlier decision in *Cuyler v. Sullivan*, 446 U.S. 335 (1980), opined that prejudice is to be presumed when counsel is shown to have been burdened by an actual conflict of interest. In this context, however, the rule of presumptive prejudice "is not quite the per se rule of prejudice that exists for the Sixth Amendment claims mentioned above [i.e., total denial of assistance of counsel and various types of state interference with counsel's as-

sistance]." *Strickland* at 692. Regarding conflict of interest claims the Court stated:

> Prejudice is presumed only if the defendant demonstrates counsel "*actively represented conflicting interests*" and that "*an actual conflict of interest adversely affected his lawyer's performance.*" (Cite omitted).

Id., at 692. (Emphasis added).

Based upon the historical facts gleaned from the testimony of Mr. Leaphart, the examination of transcripts of Petitioner's state court proceedings and the examination of documentary evidence and exhibits submitted at the federal habeas corpus evidentiary hearing, the district court concluded that the record simply did not support a finding of multiple representation of Petitioner and his co-indictee by Mr. Leaphart. Specifically the district court found, "Thus, the present case would hardly demand an inference of error where *the two indictees were tried separately by different*, if also professionally associated, *attorneys.*" (J.A. 113). (Emphasis added). The court further found, "Nor can it be said that the overlap of counsel, to the extent it existed, infected Leaphart's representation as to constitute an active representation of conflicting interests." (J.A. 180). Petitioner completely failed to factually prove his assertion of multiple representation.

B. Petitioner's interests at trial were not in conflict with those of his separately tried and separately represented co-indictee.

In addition to the district court's determination that the attorneys' assisting each other did not constitute multiple representation of each other's clients, the record before this Court also shows that Petitioner's interests at

trial were not in conflict with those of his co-indictee. Accordingly, the district court correctly found no conflicting interests between Petitioner and Stevens.

At the federal evidentiary hearing, Mr. Leaphart testified that to his knowledge the defenses presented in the separate trials of Petitioner and his co-indictee were not in conflict, but rather were the same, i.e., to put the state to its proof. (J.A. 35). The district court clearly credited Mr. Leaphart's testimony. (J.A. 114). Significantly, as previously noted, Petitioner was tried first and separately from his co-indictee. No evidence of Stevens' confession or its contents was presented at either of Petitioner's trials. Petitioner has produced no evidence that any member of either of Petitioner's juries was aware of the theory upon which Stevens' cases were tried, or the issues involved. In fact, community knowledge regarding the crime was so minimal that at Petitioner's original trial no venirepersons were excused due to fixed opinions regarding Petitioner's guilt or innocence. At Petitioner's retrial on sentencing only two venirepersons were removed due to fixed opinions as to punishment. (Respondent's Exhibit C, 23-25; 41-44).

Because Petitioner and Stevens were represented by separate counsel, at separate trials before juries who were only aware of the issues and theories in the case before them, the district court correctly concluded that there existed no actual or potential conflict between Petitioner's interests and Stevens' at trial. (J.A. 114).

C. Mr. Leaphart's representation of Petitioner was unencumbered by any conflict of interest.

Petitioner's only argument regarding the alleged adverse effect upon Mr. Leaphart's performance by an alleged conflict of interest is Petitioner's contention that counsel's asserted failure to offer Petitioner's testimony in exchange for a life sentence and counsel's decision not to argue Petitioner's alleged lesser culpability on direct appeal resulted from this contended conflict of interest. The district court properly found these assertions to be without merit as no evidence of an adverse impact was shown.

On questioning by the federal habeas corpus court Mr. Leaphart testified as follows:

> THE COURT: Did you pull any punches in order to protect Stevens?
>
> A. No.
>
> THE COURT: If crucifying Stevens would have helped Burger, would you have done it?
>
> A. Yes, sir.

(J.A. 65).

Regarding Petitioner's contentions that Mr. Leaphart never offered Petitioner's testimony against Stevens in exchange for a life sentence, Mr. Leaphart testified that there was in fact no discussion between the district attorney and him on this point. (J.A. 52-53). Mr. Leaphart explained that during his representation of Petitioner, he constantly tried to negotiate a plea with the district attorney for a life sentence, but that the district attorney "just flatly refused to even discuss it in any terms." (J.A. 74-75, 178-179). Contrary to Petitioner's characterizations of the record,

the district attorney refused to open any avenues for plea negotiations and Mr. Leaphart was never afforded the opportunity to engage in any negotiations on any level. As the uncontradicted testimony of Mr. Leaphart shows, "He [the district attorney] insisted on trying it and insisted on seeking the death penalty." (J.A. 75). In light of the unyielding position taken by the district attorney, considering his possession of a valid signed and sworn confession, physical evidence, eyewitness testimony from Private Botsford, and the heinous nature of the crime, the lack of merit of Petitioner's contention becomes apparent.

Petitioner's contention that the alleged conflict of interest manifested itself in Mr. Leaphart's failure to argue Petitioner's alleged lesser culpability on direct appeal is also without merit. Mr. Leaphart testified that on direct appeal he "raised every allegation that I could find." (J.A. 72).[3] Mr. Leaphart, experienced trial counsel, realized that arguments of lesser culpability and ingenious graphic demonstrations of such arguments are more appropriately made to trial juries. Although Mr. Leaphart commendably attempted to portray Petitioner as the less culpable party before Petitioner's juries, the fact remains that while Petitioner did not actually engage in the acts of oral and anal sodomy committed on the victim, the Petitioner looked on while these acts occurred after having actually participated in the precedent burglary, kidnapping and armed robbery. The uncontradicted evidence shows that seconds before he

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[3]Respondent notes that it was Mr. Leaphart's efforts as trial and appellate counsel which resulted in the Supreme Court of Georgia's first opinion vacating Petitioner's originally imposed sentence of death. *See Burger v. State*, 242 Ga. 28, 247 S.E.2d 83 (1978).

murdered the victim, Petitioner opened the trunk of the cab and sadistically asked the bound and nude victim if he was "all right." (T. 345-346). These acts by Petitioner, as noted by the Supreme Court of Georgia in affirming Petitioner's death sentence, "are outrageously and wantonly vile and inhuman under any reasonable standard of human conduct." *Burger v. State*, 265 S.E. 2d at 800. Thus, any *pro forma* appellate argument of lesser culpability would constitute a frivolous assertion. The evidence clearly shows that no "actual conflict of interest adversely affected [Petitioner's] lawyer's performance." *Strickland* at 692.

II. AFTER CONDUCTING A THOROUGH INVESTIGATION, COUNSEL'S STRATEGIC DECISION NOT TO PRESENT POTENTIALLY HARMFUL EVIDENCE AT PETITIONER'S RESENTENCING TRIAL DOES NOT CONSTITUTE INEFFECTIVE ASSISTANCE OF COUNSEL.

Petitioner contends that trial counsel's investigation for potentially mitigating evidence for presentation on the sentencing phase of trial was inadequate, that such evidence in mitigation did in fact exist at the time of trial and that counsel was ineffective for failing to present the same. Contrary to Petitioner's assertions, the district court and the circuit court found that counsel's investigation was not inadequate, that the alleged mitigating evidence Petitioner now identifies by affidavits was never made known to trial counsel and that counsel's strategic decision not to present the potentially damaging character evidence he possessed was a sound tactical decision.

After a thorough investigation and consultation with Petitioner and Petitioner's mother, Mr. Leaphart decided

not to direct the jury's attention to character-oriented mitigating evidence at Petitioner's second sentencing trial. (J.A. 49, 164). Petitioner produced absolutely no evidence that he ever contested Mr. Leaphart's tactical decision. Cognizant of the broad scope of mitigating evidence admissible on the sentencing phase of capital trials in Georgia, it was Mr. Leaphart's judgment that the best approach on the issue of sentencing was to argue the difference in age between Petitioner and Stevens, as well as the differing degrees in their participation in the crime. (J.A. 164-165). Additionally, Mr. Leaphart sought to prevent the district attorney from proving his case on sentencing by use of the rules of evidence and employment of every objection and motion Mr. Leaphart deemed relevant. (J.A. 165).

Mr. Leaphart was also cognizant of the wide range of evidence the State is permitted to present at sentencing trials, along with the State's unrestricted right to far-ranging cross-examination, in addition to the overwhelming strength of the evidence of guilt and aggravation against his client, thus he relied heavily on his closing argument to the resentencing jury, to which the state would have no rebuttal. In Mr. Leaphart's argument at the retrial on sentencing, counsel, with the use of a visual aid, emphasized the acts of co-indictee Stevens while he sought to minimize Petitioner's involvement in the murder and related crimes. The district court found that counsel "fully emphasized the fact that Stevens was 20 years old at the time of the crime, while Burger was only 17; that Stevens, the chief architect of the crimes, had considerable influence over Petitioner." (J.A. 165). Mr. Leaphart enumerated the series of criminal acts committed by Stevens and contrasted them to the relatively

fewer criminal acts committed by Burger, who counsel contended "was only following Stevens." (J.A. 165).

Counsel next attempted to stimulate the jurors' religious sensitivities by arguing that the concept of an "eye for an eye" was a notion of justice popular with people of the Old Testament, but not with people of today. Mr. Leaphart concluded his closing argument by reemphasizing the contrast between the criminal acts committed by Stevens, and Burger's relatively lesser involvement. Mr. Leaphart left the jury with the question, "[w]hat would Jesus Christ do if he were sitting in our shoes today?" (J.A. 165).

Mr. Leaphart testified that his strategic approach to Petitioner's retrial on sentencing, as outlined above, constituted his best strategy in light of the evidence and information available to him. Counsel's investigation of possible mitigating evidence included numerous interviews with Petitioner, Petitioner's mother, an attorney who had befriended Petitioner and his mother, in addition to counsel's consultation with a psychologist and review of reports of psychologists obtained through Petitioner's mother and interviews with the state's witnesses. (J.A. 166, 73).

The district court found as fact that Petitioner did not provide his trial counsel with the names of those individuals whose testimony Petitioner proffered by affidavit at the federal evidentiary hearing. (J.A. 168-169, 173). Because this information was not made available to counsel at the time of trial, notwithstanding the conducting of a thorough background investigation, the same should not be considered in an evaluation of the reason-

ableness of Mr. Leaphart's decision not to present evidence at the retrial on sentencing. *Strickland v. Washington*, 466 U.S. at 689-690. Notwithstanding the same, in reviewing the affidavits of these purported witnesses, the district court astutely noted that the proffered testimony could have proved extremely damaging to Petitioner if the same had been presented to his jury on sentencing, possibly insuring the return of a death sentence. (J.A. 172, n. 7). Even at its best, this proffered testimony would not have altered the sentencing profile presented to Petitioner's jury.

Petitioner was not placed on the witness stand during the retrial on sentencing because Mr. Leaphart was fearful of subjecting him to cross-examination and alienating the jury by exposing them to Petitioner's gloating and sadistic recitation of the facts surrounding the victim's kidnapping, armed robbery, subjection to oral and anal sodomy and the victim's ultimate murder. (J.A. 75-76, 166). In addition, the district court found as fact that Petitioner never gave counsel the names of any witnesses that might have been helpful to Petitioner at the retrial on sentencing. (J.A. 73, 51).

Despite the foregoing, counsel, in consultation with Petitioner's mother, ascertained the existence of an attorney in another state who had served as Petitioner's "big brother." (J.A. 57, 169). After consultation with this attorney regarding Petitioner's background, Mr. Leaphart concluded that "I was not given any information by him that helped." (J.A. 57). Petitioner produced no evidence to the contrary.

Mr. Leaphart reviewed reports of psychologists who had examined Petitioner in the past and reviewed the

possibility of the use of psychological testimony at the resentencing trial with a psychologist counsel had retained. (J.A. 57, 62). Mr. Leaphart testified that after consultation with the psychologist he knew that the psychologist's testimony would be that Petitioner was not insane, that Petitioner enjoyed committing criminal acts and that Petitioner's psychopathic personality was such that continued incarceration was required, at a minimum. (J.A. 62). (Respondent's Exhibit A at 248-251). Counsel testified that he elected not to utilize this testimony at the retrial on sentencing, and that he did not move for an additional court ordered psychiatric or psychological examination for fear that Petitioner would be examined by a state psychiatrist or psychologist whose test results would be adverse to Petitioner and made available to the prosecution. (J.A. 63).

With Petitioner's mother, and with Petitioner, counsel discussed his reluctance to place Petitioner on the witness stand and his hesitancy to subject Petitioner's mother to cross-examination because the district attorney might unearth the fact that Petitioner "had been involved in a beating and a number of things that indicated violence and stuff at an earlier—[point in his life]." (J.A. 49, 167). Through his investigation, counsel was aware that Petitioner had spent time in Florida, where he "Had gotten in some trouble down in Florida and then he went back up north where he lived and got in some trouble up there." (J.A. 52). Counsel testified that "very basically, I couldn't find anything in Mr. Burger's background which I felt would be helpful. You know, I could have put his mother up, I'm sure. And she could have said some nice things about him. But, my feeling was that a lukewarm

witness would have without any real thing to say would have possibly been harmful." (J.A. 52). The district court noted, "This judgment is not unreasonable, especially in light of the fact that calling a character witness to the stand is not without risk; there are, almost invariably, unknown poisons to be hatched out of the mud by way of cross-examination." (J.A. 171-172). *Id.*, n. 7. After having had an opportunity to observe the witness' demeanor and lack of candor, the district court specifically refused to credit Petitioner's mother's testimony that she never discussed Petitioner's background with Mr. Leaphart. (J.A. 173, n. 8). Such assessments of credibility and candor, or the lack thereof, and the impact of the same upon Petitioner's jury on resentencing were properly made and acted upon by Mr. Leaphart.

In addition, Mr. Leaphart testified that he knew that Petitioner's "mother and father had separated at an early age . . . ." (J.A. 51-52). Counsel attempted to, but was never able to locate Petitioner's father or Petitioner's wife, who left Petitioner shortly after the murder. (J.A. 74).

Mr. Leaphart also talked to co-indictee Stevens and investigated Stevens' background, but discovered nothing about Stevens that would have been of benefit to Petitioner at trial. (J.A. 177, 778, 51, 65). Petitioner has produced no evidence to the contrary.

This exhaustive investigation into Petitioner's background convinced counsel that a more in depth investigation would not have been a profitable pursuit. Confronted with overwhelming evidence of Petitioner's guilt and overwhelming evidence in aggravation, compounded by

evidence not only of Petitioner's signed but also sworn confession, counsel concluded that presenting the available lukewarm background and character evidence to Petitioner's resentencing jury would at best prove unproductive, and of even greater concern, in the crucible of cross-examination, actually damaging to his client.

Contrary to Petitioner's assertions at page 31 of his brief, Mr. Leaphart's strategic decision not to present potentially damaging character evidence to Petitioner's resentencing jury was not grounded upon an erroneous assumption that presentation of evidence by the defendant on the sentencing phase of a capital trial would divest the defendant of the right to closing argument. At the federal evidentiary hearing Mr. Leaphart testified regarding his preparation of the Petitioner for trial at the Petitioner's original trial on guilt/innocence. (J.A. 75). While explaining his reasons for not placing the Petitioner on the witness stand during the original trial on guilt/innocence, the district court interrupted and posed several questions to Mr. Leaphart specifically with reference to counsel's reasons for not placing Petitioner on the witness stand during the sentencing phase of trial. (J.A. 75-76). At the conclusion of questioning by the court, Mr. Leaphart's testimony was directed back to that original line of questioning regarding his preparation for the original trial on guilt/innocence. (J.A. 76). During his testimony regarding his conduct of the original trial on guilt/innocence, Mr. Leaphart testified that he "didn't have any witnesses I thought [were] particularly strong. And, I felt that the use of those witnesses versus the loss of the final argument to the jury, that I shouldn't do it. I felt that it was more advantageous to maintain

that. *That was in the trial in the original case.*" (J.A. 76). (Emphasis added). As the foregoing clearly reveals, Mr. Leaphart's testimony revealing his valid concern with retaining both opening and closing arguments was directed to the guilt/innocence phase of Petitioner's original trial, not Petitioner's retrial on sentencing as Petitioner contends before this Court.

In *Strickland v. Washington, supra* and *United States v. Cronic*, 466 U.S. 648 (1984), the Court articulated a two-prong test for analyzing ineffective assistance of counsel claims. The defendant must establish that his counsel's performance fell below an objective standard of reasonableness, and that there existed a reasonable probability that but for counsel's unprofessional errors the result of the proceeding would have been different. This Court defined a reasonable probability as a probability sufficient to undermine confidence in the outcome of the trial. These legal principles reveal that when a defendant challenges the death sentence the issue is "whether there is a reasonable probability that, absent the errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 446 U.S. at 694. In making this determination, the totality of the evidence before the jury must be considered. As this Court noted in *Strickland* at 696, "a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors." A defendant, in order to prevail on an ineffective assistance of counsel claim, must satisfy both the performance and the prejudice prongs of the aforementioned test.

In utilizing this test a reviewing court's inquiry must be whether counsel's assistance was reasonable considering all the circumstances as known to counsel at the time of trial. *Strickland* at 688. Judicial scrutiny of counsel's performance must be highly deferential. Because of the difficulties inherent in making this evaluation, in light of the distorting effects of hindsight, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that under the circumstances, the challenged action 'might be considered *sound trial strategy.*'" *Strickland* at 689. (Emphasis added).

As regards counsel's duty to investigate, strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable. *Strickland* at 690. "Strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation . . . [a] particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Strickland* at 690-691.

The evidence in this case clearly shows that Mr. Leaphart made a thorough investigation of Petitioner's background for potential mitigating evidence. Cognizant of the low quality of the character evidence available to him at the time of trial, the evidence in aggravation of punishment in possession of the state and after due consideration of the potential adverse impact upon Petitioner's case as a result of the cross-examination of Petitioner's character

witnesses, including Petitioner, Mr. Leaphart made a sound strategic decision not to present this potentially damaging evidence at the retrial on sentencing. Counsel's strategic decision, made after a thorough investigation of the law and facts relevant to those plausible options available, was nothing more than the traditional trial decision historically allocated to trial counsel. If Mr. Leaphart had presented at Petitioner's retrial on sentencing, the lukewarm potentially damaging character evidence available to him and if the ill effects likely to be borne as the result of a thorough and sifting cross-examination by the district attorney had in fact become a reality, counsel for Petitioner would no less vigorously advocate that Mr. Leaphart's decision to present the same was unsound and that he was ineffective. The acknowledgement of this reality, inherent in post-trial litigation in all capital cases, underscores the wisdom of this Court's opinion that trial counsel's strategic choices made after a thorough investigation of relevant law and facts are "virtually unchallengeable." *Strickland* at 690. Petitioner would have this Court disregard the teachings of *Strickland, supra* and its predecessors and conclude that notwithstanding the legitimate exercise of sound trial strategy, engaged in after a thorough investigation of the relevant law and facts known to counsel at the time of trial and after consultation with his client, Petitioner was rendered ineffective assistance because counsel professionally determined that it was not in Petitioner's best interest to present potentially damaging evidence on Petitioner's retrial on sentencing. This Court's opinions in *Strickland, supra* and its predecessors demand that Petitioner's assertion be found to be without merit.

To find ineffective assistance of counsel in this case would require the promulgation of a *per se* rule requiring trial counsel to produce evidence on the sentencing phase of a capital trial regardless of legitimate strategic concerns. Such a rule would be contrary to traditional notions of Anglo-American jurisprudence and would completely undermine the ability of counsel to effectively represent his client. No longer would an attorney be able to exercise his professional judgment on behalf of his client, but counsel would be reduced to a mechanical conduit for the production of evidence, regardless of its consequences.

III. THE TRIAL COURT'S CHARGE ON INTENT WAS NOT UNCONSTITUTIONALLY BURDEN-SHIFTING.

Petitioner contends that because his jury charge on intent contains two sentences that were also contained in the trial court's charge found to be unconstitutionally burden-shifting in *Francis v. Franklin*, 471 U.S. —, 105 S.Ct. 1965 (1985), this charge must likewise be found to be unconstitutionally burden-shifting. The district court found Petitioner's contention to be totally without merit. The circuit court adopted the district court's opinion on this issue. The circuit court subsequently, on remand from this Court, applied a harmless error analysis to conclude that notwithstanding the alleged burden-shifting nature of the charge, any error was harmless beyond a reasonable doubt. *Burger v. Zant*, 513 F.Supp. 772 (S.D. Ga. 1981), *rev'd in part, aff'd in part*, 718 F.2d 979 (11th Cir. 1983), *vacated and remanded*, — U.S. —, 106 S.Ct. 41 (1985), *on remand*, 785 F.2d 890 (11th Cir. 1985), *reh'g denied*, 796 F.2d 1313 (1986).

The trial court's charge at the conclusion of the guilt/innocence phase of trial spanned eleven pages of trial transcript. The court thoroughly charged on the defendant's presumption of innocence (J.A. 20), the state's burden of proof on each element of the offense beyond a reasonable doubt (J.A. 20), the definition of reasonable doubt (J.A. 20), the definitions of direct and circumstantial evidence (J.A. 23), a person is not to be presumed to act with criminal intent (J.A. 24. 25), definitions of general and specific intent (J.A. 24, 25) and the definition of malice and felony murder. (J.A. 26). From this entire charge Petitioner contends that the following two sentences rendered his entire trial on the issue of guilt fundamentally unfair in that they allegedly relieved the state of its burden of proof on the issue of malice:

> The acts of a person of sound mind and discretion are presumed to be the products of the person's will. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts.

(J.A. 25).

In support of his position Petitioner merely notes that these two sentences are "virtually verbatim" the instruction that was found to be unconstitutionally burden-shifting in *Francis v. Franklin*, 471 U.S. —, 105 S.Ct. 1965 (1985). Accordingly, Petitioner contends that the inclusion of these two talismanic sentences in his charge mandates a finding that his trial court's charge on "malice" (not intent) is unconstitutionally burden-shifting.

There exist several flaws of major proportion in Petitioner's argument that are dispositive of this issue. Initially, the two talismanic sentences dissected out of the

trial court's charge by Petitioner do not address the element of malice under Georgia law as Petitioner contends. These two sentences address instead the general intent of an individual to accomplish the natural and probable consequences of his or her physical acts. At a later point in its charge the trial court gave a clear, concise and constitutionally sound instruction on the concept of malice. (J.A. 26). The trial court's actual malice instruction is not attacked by Petitioner.

Secondly, contrary to Petitioner's assertions, *Franklin, supra,* does not mandate the wholesale vacating of convictions merely upon a petitioner's identification of language in his or her charge similar to that contained in the trial court's charge reviewed in *Franklin, supra.* The Court's opinions in *Franklin, supra* and *Sandstrom v. Montana,* 442 U.S. 510 (1979), do not constitute new law, nor do they establish any new analytical approach to the constitutional evaluation of jury charges for alleged unconstitutional burden-shifting effects. The protection "against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which [the defendant] is charged" had been provided by the Due Process Clause of the Fourteenth Amendment long before the decisions in *Sandstrom* and *Franklin. Franklin,* 105 S. Ct. at 1970. Likewise, the proper analysis to be used by a reviewing court testing a charge for unconstitutional burden-shifting effects had been established prior to *Sandstrom. See Cupp v. Naughten,* 414 U.S. 141 (1973). The decisions in *Sandstrom* and *Franklin* are simply fact specific applications of those long standing legal protections and principles identified above. Recognition of this fact reveals the total lack of merit of Petitioner's assertion

that the identification of talismanic words and phrases in a trial court's charge is sufficient to mandate a finding of unconstitutional burden-shifting effects.

Thirdly, application of those principles discussed above reveals that the trial court's charge on general intent was not unconstitutionally burden-shifting. Unlike the trial court's charge reviewed in *Franklin, supra,* the relevant portions of which are cited in the dissenting opinions, Petitioner's trial court followed the two talismanic "*Franklin*" sentences with an instruction on specific intent to commit the crime charged. This instruction by Petitioner's trial court significantly altered the manner in which a reasonable juror would understand the trial court's charge in Petitioner's case, as compared to the trial court's charge in *Franklin.*

In the instant case those two challenged sentences of the trial court's charge ["the acts of a person of sound mind and discretion are presumed to be the products of a person's will. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts."] refer only to the accomplishment of physical acts; they intimate no legal presumption, inference or conclusion to be drawn therefrom regarding criminal intent to kill or malice. This observation is buttressed by the fact that Petitioner's jury was thereafter immediately charged that a person will not be presumed to act with criminal intention, and, unlike Franklin's jury, was told that a specific intent to commit the crime charged was an essential element that the state must prove beyond a reasonable doubt. The trial court's charge on criminal intent coupled with that paragraph contained in Petitioner's charge but missing from the charge in Franklin's case regarding specific in-

tent to commit the crime charged, address themselves exclusively to the unlawful intent to kill. No reasonable juror hearing this charge, in the sequence in which it was actually given, would understand that "he could presume intent to kill but not the absence of justification or provocation." *See Franklin*, 105 S.Ct. at 1974. Further, any reasonable juror hearing this instruction would be clearly informed that the two talismanic *"Franklin"* sentences referred only to the accomplishment of physical acts and intimated no legal presumption, inference or conclusion to be drawn regarding criminal intent to kill or malice, as these latter principles were separately and later addressed in instruction by the trial court.

Viewing the trial court's charge as a whole, as required by *Cupp v. Naughten, supra,* as compared to dissecting and viewing in artifical isolation those two talismanic sentences identified by Petitioner, it becomes readily apparent that the trial court's charge on the accomplishment of physical acts (the *Franklin* language) and that portion regarding criminal intent and specific intent to kill, create no unconstitutional burden-shifting effect. First, Petitioner's jury was simply informed that a person usually intends the consequences of his physical acts. Next, the jury was told that no person is to be presumed to act with criminal intent, but rather such intent may be found upon consideration of the evidence produced at trial. Thirdly, having already been charged on the use of direct and circumstantial evidence, the jury was told that a specific intent to unlawfully kill the victim was an essential element that the state must prove beyond a reasonable doubt, and that the state could do this by proof of the defendant's acts and conduct. The jury was also informed that they *may infer* this spe-

cific intent to unlawfully kill the victim from proof of evidence of the circumstances of the killing, "or it *may be presumed* when it is the natural and necessary consequences of the act." (J.A. 25). (Emphasis added).

Petitioner's jury was clearly informed that the unlawful intent to kill is not, as a matter of law, to be presumed from proof of the natural and necessary consequences of a person's acts; however, "it may be presumed." (J.A. 25). The trial court's charge, when properly viewed as a whole, is internally consistent, clear, concise and is not unconstitutionally burden-shifting. Petitioner's contentions to the contrary have properly been found to be totally without merit by every state and federal reviewing court that has addressed this claim on its merits.

IV. IN THE CONTEXT OF THIS KIDNAPPING, ARMED ROBBERY, TORTURE, SEXUAL ASSAULT AND WITNESS ELIMINATION MURDER, THE TRIAL COURT'S CHARGE ON INTENT WAS HARMLESS BEYOND A REASONABLE DOUBT.

Petitioner contends that the trial court's charge that "The acts of a person of sound mind and discretion are presumed to be the products of the person's will [and] a person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts" is unconstitutionally burden-shifting and is not harmless beyond a reasonable doubt. (J.A. 25). The circuit court, relying upon this Court's decision in *Rose v. Clark*, — U.S. —, 106 S.Ct. 3101 (1986), correctly found that under the facts of Petitioner's case, the challenged charge is harmless beyond a reasonable doubt. *Burger v. Kemp*, 785 F.2d 890 (11th Cir.) *reh'g denied*, 796 F.2d 1313 (11th Cir. 1986).

In support of his assertion that the two talismanic sentences dissected from the trial court's charge were not harmless beyond a reasonable doubt, Petitioner argues that his possession of the requisite intent to commit the crime of murder was contested at trial. Because his possession of the requisite intent was allegedely contested at trial, Petitioner concludes that the trial court's alleged burden-shifting charge on the issue of intent can never constitute harmless error.

The flaws in Petitioner's argument are readily apparent. Initially, Petitioner's argument before this Court that an alleged burden-shifting charge on an issue contested at trial can never be found to be harmless was disposed of adversely to Petitioner by this Court in *Rose v. Clark*, — U.S. —, 106 S.Ct. 3101, 3109 (1986). Secondly, an examination of the Court's opinion in *Rose, supra* reveals that a harmless error analysis is applicable to alleged burden-shifting charges, and that such an analysis asks:

> Whether the evidence was so dispositive of intent that a reviewing court can say beyond a reasonable doubt that the jury would have found it unnecessary to rely on the presumption.

Rose, supra at 3190.

In order to effectuate this Court's harmless error analysis, all of that record evidence available to the convicting jury must be evaluated by the reviewing court. In this case that evidence made available to Petitioner's convicting jury is contained in Respondent's Exhibit A, i.e., the transcript of Petitioner's trial on the issue of guilt. The evidence at trial, including Petitioner's confession, revealed that when Petitioner and co-indictee Stevens ran out of money while drinking beer at the Enlisted Men's Club

at Fort Stewart, Georgia they coolly planned the armed robbery of a cab driver. (J.A. 6). When the first intended victim arrived accompanied by another male in the cab Petitioner and Stevens aborted the robbery and decided to try for a more vulnerable victim. (J.A. 6-7). In order to insure their success, they burglarized the Mess Hall and stole a knife sharpener and butcher knife. They then summoned another cab. In order to make sure that the robbery was worth their time, they first asked the cab driver if he could change a fifty dollar bill. When he replied that he could, Petitioner and Stevens asked to be taken to the Savannah Airport. At a prearranged signal, Petitioner, armed with the butcher knife, and Stevens, armed with a knife sharpener, overpowered the victim, Roger Honeycutt. (J.A. 7).

After robbing the victim, searching the cab for additional money and stripping the victim naked, Petitioner drove the cab while Stevens forced Roger Honeycutt to commit oral sodomy upon him, after which Stevens anally sodomized Honeycutt. (J.A. 8-9). Meanwhile, Petitioner would ask the victim for directions to the Savannah, Georgia airport. (J.A. 9).

Shortly before arriving at the airport Petitioner and Stevens stopped the cab, bound the nude victim with cord cut from the cab's C.B. radio and locked the victim in the trunk of the cab. (J.A. 9). Petitioner drove the cab on to the Savannah airport, from the Savannah airport to Fort Stewart, Georgia, from Fort Stewart to Jesup, Georgia and then from a convenience store in Jesup, where Petitioner and Stevens had evaded detection by police, to the borrow pit filled with water where the victim was ulti-

mately murdered. Petitioner, at all times, was the driver of the stolen cab, and on occasion would drive the cab in such a manner as to sadistically cause the bound victim to violently roll around in the trunk. (J.A. 9-12).

Petitioner's sadistic impulses and clear intent to kill were further manifested by the fact, as confessed to by Petitioner, that after wiping fingerprints from the cab and before murdering the victim, and while Stevens was away hiding the cab's C.B. radio in the bushes, Petitioner opened the trunk and asked Roger Honeycutt if he was "all right." (J.A. 18). The nude, bound and blindfolded victim replied, "Yes, sir." (J.A. 18). Petitioner, though afforded this opportunity to allow the victim to escape, then closed the lid of the trunk, entombing the victim, started the engine to the cab and drove the cab into the borrow pit, jumping from it just before impact with the water. (J.A. 18). Petitioner coldly admitted to investigating officers that he killed the victim in order to prevent the victim from identifying him and Stevens. (J.A. 13).

Under these facts it defies common sense to contend that the subject kidnapping, armed robbery, sexual assault and witness elimination murder, all of which spanned some five hours, was unintentional. (J.A. 13). "It follows that no rational jury would need to rely on an erroneous presumption instruction to find malice or intent in such cases." *Rose,* 106 S.Ct. at 3108, n.10. Petitioner's contentions to the contrary are totally without merit. Accordingly, if the trial court's instruction containing the two talismanic sentences dissected from its eleven page charge by Petitioner is determined to be unconstitutionally burden-shifting, under this Court's *Rose v. Clark,* harmless error

analysis, the subject charge, under the heinous facts of this case, is harmless beyond a reasonable doubt. If the facts of this case do not warrant a finding of harmless error, the harmless error inquiring becomes a legal fiction.

CONCLUSION

For all of the foregoing reasons, the denial of habeas corpus relief to this Petitioner should be affirmed.

Respectfuliy submitted,

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FOR ARGUMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CHRISTOPHER A. BURGER,

Petitioner,

v.

RALPH KEMP, WARDEN, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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REPLY BRIEF FOR PETITIONER

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ARGUMENT

I. IN THIS CAPITAL CASE, PETITIONER WAS DENIED THE RIGHT TO CONFLICT FREE AND EFFECTIVE ASSISTANCE OF COUNSEL.

A. The Overwhelming Record Evidence Mandates A Determination By This Court That Petitioner's Trial Counsel Actively Represented Both Petitioner And A Co-Indictee With Adverse Interests.

1. There was clearly multiple representation in this case.

The thrust of the Respondent's position throughout this litigation has been based upon a misinterpretation of the record evidence. For example, the Respondent maintains that there was no multiple representation in this case. This assertion is totally contradicted by the record.[1] Leaphart and his law partner were appointed within several weeks of Petitioner's arrest to represent Burger and Stevens respectively. Leaphart testified at the evidentiary hearing that he talked with Burger and Stevens from

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[1] The District Court made no contrary finding regarding multiple representation. Even if there were a contrary finding, however, a finding of multiple representation is a mixed question of fact and law that is reviewable *de novo*. *See Cuyler* v. *Sullivan*, 446 U.S. 335 (1980). The same is true regarding the performance and prejudice components of an effective assistance of counsel inquiry. *Strickland* v. *Washington*, 446 U.S. 668, 698 (1984).

Petitioner would note, however, that the findings of fact made by the district court that are contrary to Burger's assertions are few. Petitioner's primary contention is with the legal significance that the district court attributed to the facts. The weight given certain facts by the lower court is obviously not entitled to any F.R.Civ.P. 52 deference by this Court. To the extent that any of the findings conflict with the position taken by the Petitioner in these pleadings, Petitioner maintains that the findings are clearly erroneous in light of the entire record.

the beginning.[2] He further testified that he worked on Stevens' case. FHT 15; J.A. 32. They shared their legal research and discussed the issues in both cases. FHT 18; J.A. 35. The District Attorney inquired during jury selection whether any potential juror was being or had been previously represented by either Mr. Leaphart or Mr. Smith. Tr. 28-29, 37,42,48.[3] Mr. Smith and Leaphart were at counsel table together during Burger's trial. FHT 18; J.A. 35. Leaphart prepared both Burger's and Stevens' briefs on the second appeal to the Supreme Court of Georgia. FHT 40-41; J.A. 54.[4] The district court found: "the two attorneys at times acted as one." *Burger* v. *Kemp*, 753 F.2d 930, 941 (11th Cir. 1985) J.A. 180 (Panel majority adopted District Court order as its opinion and order).[5]

2. Petitioner's interests were adverse to Stevens' interests.

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[2] Respondent's assertion that Leaphart spoke with Stevens only in his role as counsel for Burger is not correct. *See* FHT 15-16; J.A. 32; *see also*, *Burger* v. *Kemp*, 753 F.2d 930, 943 n.4 (11th Cir. 1985) (Johnson, J., dissenting) ("Leaphart consulted confidentially with Stevens"). J.A. 184

[3] The transcript of Petitoner's first trial is referenced in this brief as "Tr."; the transcript of Petitioner's second trial is referenced as "R.Tr."; the transcript of the federal evidentiary hearing is referenced as "FHT."

[4] He did not remember who did the briefs for the first appeal. FHT 40-41; J.A. 54.

[5] The District Court further found that the two attorneys made no attempt to "Chinese wall" themselves and that they worked together on both cases. *Burger*, 753 F.2d at 939; J.A. 177. Additionally, as Petitioner argued in greater detail in his principal brief, at page twenty, if one lawyer in a firm cannot represent the two clients, then it is not permissible for lawyers associated in practice to do so. *See e.g.*, ABA Standards Relating to the Administration of Criminal Justice, the Defense Function §3.5(b).

Petitioner's interests were as adverse to those of Stevens as it is possible to be in a criminal proceeding. As every reviewing court has recognized, Burger's entire defense, as presented by Leaphart at both of Burger's trials, was that Stevens was the far more culpable party and that he had killed Mr. Honeycutt only at Stevens' direction. Stevens' sole defense at his trials was the exact opposite, i.e., that he did not know that Burger was going to drive the car into the pond. *See Stevens* v. *State*, 242 Ga. 28, 247 S.E.2d 838, 840 (1978) (Stevens' confession stated that he had advised against killing the driver and that he had not known that Burger was going to drive the car into the pond); *Stevens* v. *State*, 245 Ga. 583, 266 S.E.2d 194 (1980) (the sole mitigating evidence introduced by Stevens at his trial was that Burger had killed the victim). The District Court acknowledged that Leaphart did employ a strategy adverse to Stevens' interests when he emphasized Stevens' greater culpability. 753 F.2d at 939; J.A. 177; *see also, Burger* v. *Zant*, 718 F.2d 979, 989 (11th Cir. 1983) (Johnson, J. dissenting) ("Burger's interests were drastically adverse to those of Stevens"). J.A. 149.

The Respondent asserts that the interests of Petitioner and his co-indictee were not adverse because both Stevens and Burger chose a common defense, i.e., to "put the state to its proof." Respondent's brief at 20-21. This contention is ludicrous. Leaphart testified, and the trial records confirm, that the only semblance of a theory of defense put on by Leaphart was that Stevens was the far more culpable party in the crime. The theory of defense at Stevens' trial took the opposite approach. The Respondent's assertion also totally ignores the reality of a capital trial with more than one defendant. In any such case there will always be differences in culpability that may well make the difference between life and death. *See, e.g.*,

Fleming v. *State*, 246 Ga. 90, 270 S.E.2d 185, 188 (1980) (court acknowledged that multiple counsel is necessary in a capital case because "when the death penalty is sought . . . even a slight conflict, irrelevant to guilt or innocence, may be important in the sentencing phase").[6]

The record evidence, therefore, amply demonstrates that Leaphart actively represented the conflicting interests of Burger and his co-indictee Stevens and thus that an actual conflict of interest existed. Pursuant to this Court's holdings in *Cuyler* v. *Sullivan*, *supra*, and *Holloway* v. *Arkansas*, 435 U.S. 475 (1978), Petitioner is entitled to a new trial where he will be afforded his constitutional right to conflict free representation.

Even though no showing of prejudice is required once an actual conflict of interest is demonstrated, *Cuyler*, 446 U.S. at 349, Leaphart took several actions adverse to Burger's best interests.[7] First he never offered Burger's testimony against Stevens in exchange for a sentence of

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[6] The Georgia Supreme Court in *Fleming*, adopted a rule that there could not be multiple representation in a capital case. The rule applies with equal force to representation by a single attorney or members of the same law firm. 270 S.E.2d at 180 (defendant "must be provided with separate and independent counsel"). However, *Fleming* was decided after Petitioner's second sentence of death was affirmed by the state supreme court.

[7] This Court recognized in *Cuyler* that in the case of an actual conflict of interest, prejudice is difficult to demonstrate. 446 U.S. at 349; *see also*, *Holloway*, *supra*, 435 U.S. at 490-91 ("[I]n a case of joint representation . . . the evil — it bears repeating — is in what the advocate finds himself compelled to refrain from doing . . . [It is] difficult to judge intelligently the impact of a conflict on the attorney's representation of a client. And to assess the impact of a conflict of interests on the attorney or the attorney's options, tactics, and decisions would be virtually impossible.").

less than death. J.A. 52; FHT 38-39. *See also* Petitioner's principal brief at pp. 15-16. Additionally, he did not argue Burger's lesser culpability on direct appeal to the Georgia Supreme Court after Petitioner was sentenced to death the second time.[8]

At both trials, but especially at Petitioner's second trial, the very fact of Leaphart's and Smith's dual representation could easily have been extremely prejudicial to Burger. Leaphart testified that it was general knowledge in the community that Burger and Stevens were being retried for a crime that they had previously been found guilty of and sentenced to death. FHT 42-43; J.A. 56. He was also confident that potential jurors were aware of the

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[8] The Respondent maintains that such an argument would have been frivolous. Respondent's brief at 24. This statement demonstrates the Respondent's cynicism regarding the usefulness of the Georgia Supreme Court's proportionality review. However, this Court determined in *Gregg* v. *Georgia*, 428 U.S. 153, 206 (1976) that the Georgia Supreme Court's affirmative duty to review all death sentences, i.e., proportionality review, was a major component of the Georgia death penalty scheme that guarded against arbitrariness in capital sentencing. At the time of Petitioner's second direct appeal, the Georgia Supreme Court had not decided whether the death penalty could be imposed on one under eighteen. The issue of whether it was constitutionally permissible to execute minors was perculating in the courts then and it has never been decided by this Court although the issue was before this Court in *Eddings* v. *Oklahoma*, 455 U.S. 104 (1982) two years after Burger's appeal. Furthermore, it would seem self evident that the significantly lesser culpability of a seventeen year old defendant, who due to a mental impairment is functioning at the level of a twelve year old, is exactly the type of situation that proportionality review is meant to, at the very least, take into consideration in determining whether the death penalty is appropriate. Certainly briefing and arguing the issues of Petitioner's lesser culpability as well as his age and mental condition would not have been frivolous.

prior convictions and sentences. FHT 43; J.A. 56. The voir dire at the second trial confirms this. At least[9] twenty-three of the forty-eight potential jurors were aware of the facts of the case. However, Leaphart did, for all practical purposes, no voir dire to determine if people were aware of who had represented the two co-indictees at the first trial (in order to determine if the potential jurors knew that he and his law partner had represented Burger and Stevens) or whether potential jurors knew the theories on which the previous cases were tried (in order to find out whether anyone knew that he and his law partner had tried the cases on inherently conflicting theories). This was of critical importance in the small rural community in which Petitioner twice received the death penalty; a community in which according to Leaphart "[e]verybody knows what everybody is doing generally" and when the case was "a well publicized event" and "[e]verybody knew about it." FHT 41; J.A. 54-55.[10] The above are the type of inquires that a counsel with undivided loyalties would certainly have made for the obvious reasons that if any juror were aware of any of the above facts, Petitioner's trial would become in that juror's

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[9] In all likelihood, more than twenty-three of the forty-eight potential jurors qualified knew the details of the crime and the first trial. In the first panel of twelve there were affirmative responses to Leaphart's inquiry of whether any juror had any knowledge of the facts of the crime. However, the record does not reflect the number of affirmative responses. R.Tr. 22. In the second panel, of twelve, nine jurors had knowledge. R.Tr. 34. In the third panel of twelve, six were aware of the facts of the crime; and, among the fourth panel of twelve, eight responded affirmatively. R.Tr. 48.

[10] In fact, Leaphart testified that one of the primary reasons he did not move for a change of venue was because he believed that if the motion were unsuccessful jurors would have learned that he moved for a change of venue and would have held it against the defense. FHT 41; J.A. 55.

mind merely a charade and a game with the purpose being to blame whomever was not on trial.[11]

Because Leaphart labored under an actual conflict of interest that adversely affected his performance Petitioner is entitled to a new trial.

B. Leaphart's Decision Not To Present Any Mitigating Evidence At The Penalty Phase Of Petitioner's Trial Was Based Upon An Inadequate Investigation And Constituted Ineffective Assistance Of Counsel Under The Facts Of This Case.

1. The scope of Leaphart's investigation.

As has been the case throughout these proceedings, the Respondent has again misstated the nature of the record evidence.[12] The Respondent maintains that Leaphart

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[11] At Petitioner's first trial, the jury was also selected from four panels of twelve potential jurors. Leaphart did not ask the first two panels whether they had read or heard about the facts of the crime. He did ask the third panel if anyone had read about the case. Some jurors responded affirmatively but the record does not reflect how many did so. Tr. 43. In the last panel, three of twelve stated that they knew the facts of the crime. Tr. 49-50.

[12] One of the most glaring examples of this is the Respondent's continued assertion that Burger opened the trunk of the car, asked Honeycutt if he was alright and then closed the trunk and then immediately drove the car into the pond. The Respondent attempts to portray the events in this manner in order to show that Burger acted in a sadistic manner. However, the record clearly demonstrates that Burger asked Honeycutt if he was alright while Stevens was off in the bushes hiding the C.B. radio. *See* J.A. 18; Re. Tr. 207 (transcript from second trial). It was only after Stevens came back that Burger learned that Stevens intended to kill Honeycutt. *See* Burger's confession (introduced at both trials as State's Exhibit 26) following Re. Tr. 259 at page three of four pages of the confession; *see also* Tr. 79 (where even the District Attorney maintained in his opening argument that the two only decided to kill Honeycutt after Stevens came

made a thorough investigation into possible mitigating evidence and that he conducted "numerous interviews with Petitioner, Petitioner's mother, [and] an attorney who had befriended Petitioner and his mother." Respondent's brief at 26. Leaphart's testimony as to his investigation speaks for itself and is reproduced below:

> Q. When is the first time you talked to any of his family?
>
> A. Whenever they came to town.
>
> Q. Did you call and tell them about the trial?
>
> A. No, I don't think I did.
>
> Q. Well, the time that the trial was going to happen the first time, you had talked to the family before the — before the supposed —
>
> A. I can't remember. I think I talked with his mother, at some point in time.
>
> Q. Before that.
>
> A. Before the trial?
>
> Q. Before she came to town. You had talked to her.
>
> A. I may have talked to her on the phone. I can't remember.
>
> Q. Did you ask her anything about his background?
>
> A. Yes, I think we discussed it.
>
> Q. Did you explain to her what the penalty phase of the trial was about, and what evidence could be presented then?

---

back from disposing of the radio). Thus at the time that Burger asked the victim if he was alright he thought that he and Stevens were going to leave the car and the victim in the woods while they escaped.

A. I don't think I went into that with her.

Q. Did you explain to any member of his family?

A. She was the only member of the family that I remember being involved with.[13]

(FHT 36; J.A. 50)

* * * *

Q. How many times did you talk to Mr. Burger before the trial and for what period of time?

A. I can't remember that. I don't know. A number of times.

Q. How long is the longest time you ever talked to him?

A. Probably about an hour.

Q. On how many occasions?

A. I can't remember that. About maybe a half a dozen times.

Q. And, who other than his mother when she came to town did you talk to?

A. I think that was all I talked to, his mother. You know, in the family.

Q. Did you make any attempt to talk to the other people that he had lived with during his life?

---

[13] Petitioner's mother testified that she learned of the trial only a few days before the first trial from a relative. FHT 75; J.A. 83. She went to Georgia and sought out Leaphart who had never contacted her. She further testified that he did not inquire into any potential witnesses and that he never explained to her the nature of the admissible evidence at the penalty phase. FHT 75-76; J.A. 84. She testified that she spoke with him for possibly a half hour before going to trial. FHT 76; J.A. 84.

A. I couldn't — didn't know who they were. . .

(FHT 37; J.A. 51)

* * * *

Q. Did you interview any witnesses other than on the witnesses for the State, the State's list of witnesses, or potential witnesses?

A. I interviewed, I had of course, the psychologist that I interviewed and discussed the case. And, of course, discussed it with his mother. As far as going out and trying to find any additional witnesses, which would help him in the sentencing stage, I did not have any knowledge of any witnesses that — potential witnesses that I thought would have benefitted him. Had I known or had knowledge of any, I would — certainly would have used them.

(FHT 43-44; J.A. 57)

* * * *

Therefore, even crediting Leaphart's testimony, he spoke with Petitioner at most six times for a maximum of one hour each time. This six hours included, of course, inquiries regarding the guilt/innocence phase of the case and the circumstances and details of the crime itself. A review of the federal evidentiary hearing transcript reveals that this was Leaphart's primary concern. He spoke with Petitioner's mother immediately prior to the first trial on one or possibly a few more occasions but he never explained the nature or scope of admissible evidence at the penalty phase. He spoke with an attorney on one occasion who had been Petitioner's "big brother" in Indiana. But Leaphart did not pursue that avenue any farther when he learned that the attorney was a black person. FHT 45; J.A. 57-58. According to Leaphart's

testimony, he did no investigation into Burger's background in Indiana, where Burger had spent most of his life, except to read a psychologist's report provided by Petitioner's mother. FHT 35-36; J.A. 50. He made no attempt to talk to any person other than Petitioner's mother that he had lived with during his life, even though Burger had lived for extended periods of time with others. FHT 37; J.A. 51. He never went or sent any investigator to any town that Burger had lived in to seek out potential mitigation witnesses. FHT 54; J.A. 65. Contrary to the Respondent's assertions, there is no evidence that Leaphart ever attempted to locate Petitioner's father.[14]

Of special significance to a proper resolution of this case is that Leaphart did absolutely no investigation between the first and second trial. FHT 43; J.A. 56. Petitioner's first sentence of death was vacated by the Georgia Supreme Court on September 5, 1978. The case was remanded for a new trial solely on the issue of punishment, i.e., whether Burger would be sentenced to life imprisonment or death. Despite the limited scope of the second trial, Leaphart made absolutely no effort to develop and prepare a mitigation case in the ten months between the reversal of Petitioner's sentence and his second trial, which began on July 16, 1979. Leaphart's testimony was that he only reviewed the file and decided to try the case the same way as he did the first time. FHT 43-44; J.A. 56-57. Under the facts of this case "Leaphart failed to conduct a reasonable substantial investigation into avail-

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[14] On cross-examination at the evidentiary hearing, Mr. Hill asked Leaphart the leading question whether he was ever able to locate Burger's father. Leaphart said no. FHT 64; J.A. 74.

able mitigating evidence" *Burger* v. *Zant*, 718 F.2d at 992 (Johnson, J. dissenting).[15] J.A. 154.

Nor can this evidence be said to have been "lukewarm" or "low quality" mitigating evidence. Any review of the testimony of the Petitioner's mother at the federal evidentiary hearing (beginning at FHT 74; J.A. 83) will reveal that her testimony regarding the abuse suffered by Burger during his formative years is not lukewarm. The District Court recognized that Petitioner's mother provided a "more compelling explanation of Burger's background" and that present counsel "were successful in finding other witnesses who could paint a tragic childhood background" 753 F.2d at 938.[16] J.A. 173. Leaphart, however, had no knowledge of most of this evidence and failed to comprehend the significance of what little he did know.

This is precisely the type of evidence which this Court acknowledged in *Eddings* v. *Oklahoma*, 455 U.S. 104,

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[15] Leaphart's testimony that Burger did not provide him with the names of mitigation witnesses should be discounted. Leaphart knew that Burger had an 82 I.Q. and functioned at the level of a twelve year old. In fact at one point, Leaphart was asked if Burger cooperated with him. Leaphart answered "[h]e was as cooperative as he could be." FHT 65; J.A. 75. As Petitioner maintained in his principal brief at p. 29, he does not believe that this Court is prepared to say that a failure to investigate mitigating evidence on the basis of limited discussions with a mentally impaired adolescent constitutes adequate representation. Therefore, any decision to rely solely on Burger to provide witnesses was unreasonable in this case.

[16] Petitioner also introduced affidavits from several additional witnesses from Indiana into evidence at the federal evidentiary hearing which corroborate Burger's mother's compelling description of his formative years and that they would have been willing and able to so testify if they had been contacted by Leaphart.

114-116 (1982) would warrant a sentence less than the death penalty.

2. Leaphart's failure to comprehend the purpose of mitigation evidence.

In fact, as the following colloquy demonstrates, Leaphart's testimony can be fairly read to state that he believed that no matter what evidence regarding Petitioner's individualized characteristics was available it should not have been presented and he would not have presented it in this case.

> Q. Did you ever consider using the psychologist for other things, other than that?
>
> A. I could have — if he had been of the opinion, you know, question of sanity, I could have used that instance, but he was not of that opinion. I did not see the benefit of going out and trying to find the sociologist, or psychologist to use in that particular trial in that particular place, because I did not think that that would be effective. Not the way to do it. I felt the way to try that case was to take the evidence that was there and try to minimize Mr. Burger's participation in the crime. It was my opinion that that was the best way to try this case and that to try to drag in these other people, or some witnesses who may have known something, some little something about him and that would have said something like he was a good boy and went to church, I couldn't find any of those to start with. But, even so, I would not have used that type of witness because I did not think that that was the way to handle that case. I felt that case should have been tried on the facts and make the District Attorney — I say make him, use whatever rules of evidence to exclude those harmful facts, and then use the — my opinion in representing Bur-

> ger was then use those facts to show that he was just there and was not entitled to be treated in the same manner as the person who was — who was the main actor in the thing. That he was a secondary, he was in a secondary position. Since there were two punishments in that particular situation, that he should be given the lesser of the two. I think that's the way that case should have been tried, and that's the way I tried it. And, I don't know of — today, if I had to go back and try it again I would do it in the same manner — I say in the same manner, much the same manner, using the same thing and hope I got a different jury. That's all. And, that's it. FHT 51-52; J.A. 63-64.

Leaphart's testimony and the brief of the Respondent indicate a fundamental misunderstanding of the purpose of introducing mitigation evidence at the penalty phase of a capital trial. In their collective view, evidence in mitigation should not be introduced unless it presents a defendant in an altogether positive light and indicates that he was a perfect citizen (a "good boy" that "went to church") before the offense for which s/he now stands before the sentencing body to have his or her fate determined. Of course, that is rarely if ever the case.

The purpose of the mitigation case is to give the sentencer information regarding the "compassionate or mitigating factors stemming from the diverse frailties of humankind," *Woodson* v. *North Carolina*, 428 U.S. 280, 304 (1976) which will encourage it to impose a sentence less than death. Evidence about the defendant's background and character is critical "because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *California* v.

Brown, ___ U.S. ___, 55 U.S.L.W. 4155, 4157 (January 27, 1987) (O'Connor, J. concurring).

Leaphart did not even present what mitigating evidence he did know of, i.e., that Petitioner had no prior criminal record of any kind and that due to a mental impairment he functioned at the level of a twelve year old.[17] In a case such as this the failure to adequately investigate and present evidence regarding the horrible background and the physical and emotional abuse suffered by this Petitioner makes the resulting sentence of death unreliable. The death penalty in this case could not

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[17] Leaphart testified that he did not use the psychologist because he testified at the Jackson-Denno hearing that Burger was a sociopath with a psychopathic personality and that a sociopath was crazy and did not belong in an insane asylum. Therefore, Leaphart believed this evidence which would come out in cross-examination would be harmful to Burger. J.A. 62. A review of the psychologist's testimony indicates that Leaphart misunderstood what the psychologist told him. This is not surprising since Dr. O'Haire only saw Burger on one occasion; the Saturday before Petitioner's first trial began the two days later, on Monday. Tr. 244. Thus, at best, Leaphart would have had only minimal time to consult with Dr. O'Haire. After testifying that Petitioner had an 82 I.Q. and due to a mental impairment and likely brain damage he functioned at the level of a twelve year old (Tr. 244, 248), Dr. O'Haire further testified that Burger lacked the ability to learn from previous experiences and that he had severe lack of feelings of self-worth due to his inability to deal with peers or family members. Tr. 247. Dr. O'Haire did testify that Petitioner needed to be confined. However, his testimony also indicates that he believed treatment would have been beneficial and suggested as a suitable place "the full security prison" in Milledgeville, Georgia. Tr. 259-260. Milledgeville is the psychiatric prison in Georgia. Therefore, while the doctor's testimony was not wholly positive it would have informed the jury of Burger's mental deficiencies. his lack of feelings of self worth and ability to reason normally. In the context of the circumstances of this case, it may well have led to a sentence less than death.

have "reflected a reasoned *moral* response to the defendant's background, character and crime . . ." *California* v. *Brown*, *supra* (O'Connor, J. concurring).

The Respondent's position in this case, examined closely, is that any time an attorney attempts to justify egregious errors after the fact by utilizing the "talismanic" words "judgment," "choice," or "strategic decision" that attorney can not be found to be ineffective. Petitioner does not believe that was this Court's intent in *Strickland* v. *Washington*, *supra*.

II. THE INSTRUCTION ON MALICE AND INTENT WAS CONSTITUTIONALLY FLAWED

Respondent points to what he believes to be curative instructions in the trial court's charge to the jury. Petitioner would note that virtually all the phrases pointed to by the Respondent were also present in the charge given in *Francis* v. *Franklin*, 472 U.S. ____, 105 S.Ct. 1965 (1985) and rejected by this Court as being insufficient to cure the constitutional deficiencies in that case. *Id.* at 1974-76. Likewise, the language pointed to by the Respondent does not cure the error in the charge given at Burger's trial.

CONCLUSION

For the foregoing reasons, and for reasons previously presented, Petitioner submits that this Court should reverse the judgment of the Court of Appeals.

Respectfully submitted,

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